

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-111**

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit

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Petitioner prays that a writ of certiorari be issued to review the decision rendered in this cause on April 28, 1978, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Judgment incorporating the jury verdict in the United States District Court, entered on August 19, 1975, appears in the Appendix (A-1).*

* Parenthetical page references followed by the letter "a" refer to the page of the printed Appendix hereto.

The Memorandum entered by the District Court on August 30, 1976, dealing with UMW's post-trial motions for judgment N.O.V. or a new trial, is unreported and appears in the Appendix (A-1 to A-10).

The Amended Judgment entered in the District Court on August 30, 1976, appears in the Appendix (A-10 to A-11).

JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was entered on April 28, 1978, and this petition for writ of certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Is there sufficient evidence to sustain a verdict against UMW under the Sherman Act on the theory that UMW, in its wage negotiations with Scotia, insisted upon its standard agreement pursuant to an anti-competitive Union-employer conspiracy, and sought thereby to impose ruinous wage standards upon Scotia?

2. Did the District Court and Court of Appeals err in upholding a verdict against UMW based on a finding of a conspiracy to impose a ruinous wage standard where, in the negotiations involved, Scotia did not deny but admitted an ability to meet the standards and where Scotia offered, but UMW rejected, the following alternatives: (1) Agreement at substantially below UMW standards; or (2) Agreement at UMW standards but coupled with a UMW promise not to organize an affiliated mine?

STATUTES INVOLVED

The Statutes relevant to the issues in this case are: 15 USC Sec. 1, 2, 15 and 17 (Sections 1, 2, 15 and 17 of the Sherman Act); 29 USC Sec. 52 (Section 20 of the Clayton Act); and 29 USC Sec. 102 and 104 (Sections 2 and 4 of the Norris-LaGuardia Act). These are reprinted in the Appendix (A-12 to A-17).

STATEMENT OF THE CASE

Scotia is a corporation organized in 1961, operating a deep coal mine in Letcher County, Kentucky, producing approximately one million tons annually. Scotia is a subsidiary of Blue Diamond Coal Company, a corporation which had operated deep mines since 1923 in Kentucky, Tennessee and Virginia, and which, at the time in question, had amassed a net worth of approximately \$19,000,000.00 (JA 43, 46, 54, 59).*

By 1965, both the Scotia mine and the Leatherwood mine, Blue Diamond's only remaining mine, were operating under a contract with the "Southern Labor Union" (SLU) as employee representative (JA 43, 53-55, 300).

A UMW organizing drive at Scotia in 1965 led to an NLRB election resulting in UMW's certification as bargaining representative on March 7, 1966 (JA 226, 229, 393).

Wage negotiations began, and when the parties could not reach agreement, UMW called a strike on June 1, 1966. In the six formal negotiating meetings between Scotia and UMW.

* Parenthetical page references preceded by "JA" refer to the page of the printed joint Appendix forming part of the record below, which record is not being filed with this petition.

three of which occurred before the strike, the parties started and remained poles apart (JA 227-236).

At no time in the negotiations did UMW insist upon the terms of the National Bituminous Coal Wage Agreement as amended in 1964. In fact, both its wage and welfare demands *exceeded* the level of the 1964 agreement. Scotia's offers fell substantially below the level of the National Agreement (JA 228-233).

At no time in the negotiations did Scotia claim an inability to pay UMW's demand. In fact, in discussions between Blue Diamond President Bonnyman and UMW Vice-President Titler, Blue Diamond's position was that it *could* and *would* sign the contract, assuming local problems could be worked out, but if and only if UMW would agree not to attempt to organize Blue Diamond's Leatherwood Mine. Bonnyman's testimony leaves no doubt about Scotia's ability to meet the terms of the contract:

Q. Did you indicate to him at that meeting that you could afford to sign a contract at Scotia but not Leatherwood?

A. I indicated to him and to the other officials up until that meeting that we could entertain the idea of signing a contract at Scotia. Although we felt and subsequent events have proven, that signing a contract at the mine under the conditions under which it was operating would have resulted in a shift in the mine from a profitable operation to a very marginal operation with a substantial investment there.

Q. Did you indicate a willingness to sign the contract with Scotia at that meeting?

A. We indicated that we would. We never said we would sign a contract but we said we would entertain the idea

of signing a contract subject to working out certain coal conditions, but we could not afford to do it in the Leatherwood field.

Q. Did you make a proposal that would involve some sort of arrangement at Leatherwood?

A. We in substance, the substance, that we were willing to do and, of course, we did not lay it completely flat on the table, but in substance, that what we indicated was that if they would leave us alone in the Leatherwood field and if we could work out some of the local problems at Scotia, that we would sign with them. Subsequent events proved that this would have been a very disastrous course at Scotia.

Q. Did Mr. Titler say anything as to whether the Mine Workers would do that, or not?

A. There was never any indication that they were willing to do this. (JA 299-300)

Because of the impasse in the formal sessions, because UMW would not sacrifice the organizational rights of Leatherwood employees for a Scotia contract, the strike occurred. Additional meetings were held, but with no meaningful progress (JA 232, 234-236).

Although the strike involved extensive picketing (Scotia obtained an injunction against picketing, which was later modified to permit nine picketers at one time), there is no pattern in the evidence of violence by the picketers, and there were no attempts by Scotia to obtain contempt citations for picketing violations (JA 239).

The strike continued for about a year, but was eventually broken as Scotia employees found employment elsewhere or returned to work at Scotia. The company had been able to resume production on a limited basis as early as July, 1966,

employing returning strikers in part, and new employees in part (JA 246-250).

Scotia brought this action under Sections 1 and 2 of the Sherman Act, claiming that UMW conspired with large coal operators—primarily those of the Bituminous Coal Operators Association (BCOA)—to force Scotia and other small coal producers out of business. Jurisdiction was conferred on the United States District Court, Eastern District of Kentucky, by 15 USC Sec. 15.

Scotia contends that the conspiracy began in 1950 with the formation of the BCOA, coupled with a contemporaneous agreement between UMW and BCOA to impose the provisions of the National Bituminous Coal Wage Agreement of 1950 on all coal mine operators, knowing that small, non-mechanized operators would be unable to meet the contract terms.

Scotia claims that the conspiracy continued through the 1964 and 1966 Amendments to the National Agreement, and that UMW was acting pursuant to the conspiracy when it insisted on the terms of the National Agreement in 1966 contract negotiations with Scotia.

The allegations of conspiracy, in general, are similar to those made in other cases involving UMW.¹ Since this Court is well-acquainted with those cases, UMW believes it would serve no purpose to review the record of this case in depth. There are, however, critical factual distinctions between this case and the others which will be explored at appropriate points.

¹ *UMWA v. Pennington*, 325 F.2d 804 (6 Cir. 1963), rev'd 381 US 657 (1965), opin. on remand 257 F.Supp. 815 (E.D. Tenn. 1966), aff'd 400 F.2d 806 (6 Cir. 1968), cert. denied, 393 US 983. *Ramsey v. UMWA*, 416 F.2d 655 (6 Cir. 1969), rev'd 401 US 302 (1971), opin. on remand, 344 F.Supp. 1029 (E.D. Tenn. 1972), aff'd 481 F.2d 742 (6 Cir. 1973), cert. denied 414 US 1067. *Tenn. Consolidated Coal Co. v. UMWA*, 416 F.2d 1192 (6 Cir. 1969), cert. denied 397 US 964. *UMWA v. South-East Coal Co.*, 434 F.2d 767 (6 Cir. 1970), cert. denied 402 US 983.

UMW denied the existence of any conspiracy, contending that its wage demands on Scotia were motivated by its own historic policy, dating back to 1890, of seeking uniform wages, decent and safe working conditions, and various fringe benefits, and did not result from agreement with BCOA or any coal operator. Absent proof of such agreement by a preponderance of the evidence, UMW cannot be held in violation of the Sherman Act.

There was no direct evidence of conspiracy at the trial. All testimony of officials of UMW and BCOA, the alleged conspirators, contained direct denials (A-3). The District Court denied UMW's motion for directed verdict. The jury returned a verdict for Scotia, and the Court denied UMW's motions for judgment N.O.V. or new trial, noting four areas of indirect evidence from which the jury "might" have inferred a conspiracy (A-4 to A-7).

These four areas of evidence were (1) the Protective Wage Clause of the 1958 National Agreement, (2) the 80-cent clause of the 1964 National Agreement, (3) the fact that since 1950 and the formation of the BCOA, UMW has approved no contract "except under national terms," and (4) the stated preference of UMW and BCOA leaders for "concentration of the coal industry in strong hands."²

² Citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 US 690 (1962), the District Court reminds us that the evidence is to be viewed as a whole, without compartmentalizing the facts and without wiping the slate clean after scrutiny of each circumstance. We, of course, have no quarrel with that rule. We do not understand, however, that a point-by-point analysis of the evidence is inappropriate and it is impossible to discuss the matter in any other way. Indeed, this is the way the evidence is discussed in the other conspiracy cases cited above. Neither do we understand the rule entitles any trier of fact to find a conspiracy by some vague intuitive process. "Either there is some agreement, combination, or conspiracy, or there is not" and it must be found in the evidence. *US v. Morgan*, 118 F. Supp. 632, 634 (D.C. S.D. N.Y. 1953).

Considering first the fact that UMW since 1950 has approved no contract except under national terms, it should be noted that the District Court in *Ramsey* (344 F. Supp. 1029, 1037) dealt with the identical question, finding no special significance in the post-1950 period, pointing out that "it appears clear from the evidence that national uniformity in wage rate and labor standards in the coal industry has been a consistent policy and goal of the UMW since its inception in 1890."

More importantly, it is clear from *Pennington* (381 U.S. 657, 665) that no inference of conspiracy may be drawn from the mere fact of UMW insistence on uniform wage demands:

Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. *Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy* (emphasis added).

If, as *Pennington* holds, a wage demand based on a policy of uniformity is not evidence of conspiracy in a particular case, how can it be evidence of conspiracy that the same goal of uniformity has been consistently pursued in all other cases? Motivation for the wage policy, not consistency of application of the wage policy, is the issue. Consistency of application of the wage policy indicates nothing about whether the policy was formed unilaterally or by forbidden agreement. Precisely because it is impossible to divine the motive from the conduct, *Pennington* has established that an inference of conspiracy cannot spring from the conduct alone. This holding simply em-

bodies the equal inference rule, to the effect that where two inferences are equally possible, with no basis to choose between, the party with the burden of proof cannot rely on the inference favorable to him to meet his burden. Thus, the District Court erred in holding that an inference of conspiracy could arise from UMW's consistent attempts to implement a uniform wage policy.

The District Court ignored this same rule in holding that the jury could have inferred a conspiracy from public expressions by UMW and BCOA leaders of preference for concentration of the coal industry in strong hands. Again, two inferences may be drawn. One is that these statements evidenced a conspiracy. The other is that the statements simply evidenced a coincidence of motives. Logic dictates that whether the expressions were independently arrived at or born in conspiracy simply cannot be divined from the mere fact that the statements were made.

The *Ramsey* District Court (344 F.Supp. 1029, 1037, 1038) properly assessed the issue of coincidence of motives:

As regards any inference to be drawn from a competitive motive on the part of BCOA, upon further reflection it is apparent that in a competitive economy a competitive motive will be universal to all coal producers. To draw an inference of antitrust conspiracy from this motive would be somewhat of an anomaly . . . The Union was motivated to seek higher uniform wages and welfare benefits for its members. The BCOA was motivated to seek protection for its members from lower wage competition. A coincidence of motives does not of itself connote a Sherman Act conspiracy, nor does it make unilateral action to achieve these goals conspiratorial. Otherwise every employer and every union signing a collective bargaining agreement might well find themselves unavoidably exposed to an anti-trust charge.

To hold otherwise would make the fears of Justice Goldberg a reality (*Pennington* dissent 381 US 715):

The jury is therefore at liberty to infer such an [anti-competitive] agreement from . . . evidence that a union's philosophy that high wages and mechanization are desirable has been accepted by a group of employers and that the union has attempted to achieve like acceptance from other employers.

Because the jury could not *possibly* determine from the statements of UMW and BCOA officials whether they resulted from a legal coincidence of motives or illegal conspiracy, the District Court erred in holding that the jury might have drawn an inference of conspiracy from the mere making of the statements.

The District Court also found that the Protective Wage Clause³ was susceptible of a construction which would support an inference of conspiracy by the jury. The Court explained its decision to allow the jury to construe the PWC by noting that the Sixth Circuit, in *Tennessee Consolidated*, found the PWC

³ PWC was proposed by UMW in 1958 negotiations as a means of protecting its members against the consequences of subcontracting. After controversy, the operators agreed to the provision. It required, in Paragraph B, that coal mined, produced, prepared, procured or acquired by signatory operators must be mined under labor standards as favorable to employees as those in UMW's contract. In negotiation of this provision, the operators sought and UMW agreed to a reciprocal commitment that UMW would enforce the agreement to all signatories thereto equally. This resulted in PWC's Paragraph A, which read:

"During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto."

to be ambiguous and allowed the jury to determine its meaning (A-4).

UMW does not concede that the Courts have definitely ruled the PWC to be ambiguous in this line of conspiracy cases. Even if the PWC is ambiguous, the ambiguity must be resolved in favor of the UMW position, as a matter of law. It is true that the Sixth Circuit, in *Tennessee Consolidated* (416 F.2d 1192, 1198) did state that Judge Wilson held the PWC to be ambiguous in *Ramsey* (265 F. Supp. 388, 412), and that Judge Taylor held the same in *Pennington* (257 F.Supp. 815, 862).

In fact, Judge Taylor did *not* find the PWC ambiguous in *Pennington*. While allowing that "the language in Paragraph A is not as clear as it should be" (257 F. Supp. 815, 862), he stated in the very next paragraph, referring to the admissibility of testimony concerning the PWC:

This testimony would only be competent if the contract is ambiguous. We understand that it is the position of both parties that the contract is not ambiguous.

Apparently, then, Judge Taylor found, as a matter of law, that the PWC was unambiguous, applied only to the signatories thereto, did not bind UMW to the same standards and conditions as to non-signatories, and thus was not evidence of conspiracy.⁴

Neither is Judge Wilson's position on the PWC accurately stated by the Sixth Circuit in *Tennessee Consolidated*. While he did mention in first *Ramsey* (265 F.Supp. 388, 412) that the PWC "is not without ambiguity," he clearly adopted the position advocated by UMW as a matter of law:

⁴ The issue has not been considered by the Supreme Court. In the dissenting opinion in *Ramsey* (401 US 302, at 316) Justice Douglas remarked, with Justices Black, Harlan and Marshall concurring, ". . . There is not a word in the agreement, as I read it, that covers non-signatory operators."

The law is well settled in this regard that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law . . . The Court must accordingly adopt the latter construction and conclude that the Protective Wage Clause did not by its terms forfeit the Union's exemption from the antitrust laws.

Judge Wilson reaffirmed this rule of construction as to the PWC in second *Ramsey* (344 F.Supp. 1029, 1034), and noted therein the Sixth Circuit's specific approval of that rule of construction in *Pennington* (400 F.2d 806, 814) and in first *Ramsey* (416 F.2d 655, 659).

This rule of construction is based on the same equal inference rule discussed above. Where two equally possible inferences can be raised, and the jury would have no basis to choose between, it is error to allow them to speculate.

In view of these decisions by Judge Taylor and Judge Wilson, and the Sixth Circuit's endorsement thereof prior to this case, UMW submits that the District Court here erred in allowing the jury to construe the PWC, which despite the Sixth Circuit's inaccurate comments in *Tennessee Consolidated*, must be construed as a matter of law in favor of UMW's position.

Additionally, in respect to the PWC, both *Tennessee Consolidated* and *South-East Coal Co.*, the cases in which the Sixth Circuit upheld jury verdicts, involved damage periods prior to 1964. The PWC was removed from the National Agreement in 1964, and the wage negotiations and strike at Scotia occurred in 1966. Even if an inference of conspiracy could arise from the language of the PWC (and as a matter of law it cannot), no such inference could be permitted in this case, where the conduct at issue occurred nearly two years after elimination of the PWC.

The final evidence noted by the District Court as possibly supporting a finding of conspiracy is the 80-cent clause,⁵ appearing in the 1964 and 1966 National Agreements. In *South-East* (434 F.2d 767, 782), the Sixth Circuit discussed the 80-cent clause for the first and only time, in the antitrust context, making clear that the clause was to be construed in the same manner as the PWC.⁶

The Sixth Circuit did not find it necessary to pass on the legality of the 80-cent clause in *South-East*, and in discussing the sufficiency of the evidence to support the jury verdict of conspiracy, emphasized that while the circumstantial evidence (including the 80-cent clause) "in and of itself might not support the jury's verdict," there was *direct* evidence of conspiracy (involving not UMW, but two co-defendant operators) setting *South-East* apart from *Pennington* and *Tennessee Con-*

⁵ The 80-cent clause of the 1964 National Agreement replaced the PWC and reads as follows:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (\$0.40) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal produced or acquired by any signatory Operator for use or for sale, (i.e. all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (\$0.80) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so produced or acquired on which the aforesaid sum of forty cents (\$0.40) per ton had not been paid into said Fund prior to such procurement or acquisition."

It is to be observed there is no language in this provision which limits UMW in any way in its negotiations with non-signatory operators.

⁶ "Reviewing the *Ramsey* decision's interpretation of *Pennington*, four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in

solidated, and constituting substantial evidence to support the jury's verdict.

The Sixth Circuit did not intimate what its ruling on the 80-cent clause would have been, but clearly indicated that the criteria would be those on which the PWC is tested.

Since the 80-cent clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions in plain, unambiguous terms, dealing solely with the obligation of signatory operators, it could not provide a basis for finding a conspiracy. Even if by stretching the imagination, some language in the 80-cent clause might be read to bind UMW to hold non-signatories to the National Agreement, it would at most admit of two constructions dependent on motivation, one legal and one not, with the motivation not determinable from the contract language.⁷ The Court

pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if, however, the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision."

⁷ The National Labor Relations Board has upheld this provision as a labor standards provision under 29 USC 158 (e). *Int'l Union, UMWA, et al.*, 188 NLRB No. 121 (February 26, 1971). The Sixth Circuit Court of Appeals has found the provision violative of 29 USC 158(b) (4) and 158(e) in *Riverton Coal Co. v. UMW*, 453 F.2d 1035 (1972). *Riverton* did not, however, hold the provision to be violative of the Sherman Act. In the instant case the District Court charged the jury that should it find "the only agreement or understanding express or implied between the United Mine Workers of America and BCOA or any other group of coal operators

then must as a matter of law adopt the construction which does not violate the law, as demanded by the rule of construction discussed above in connection with the PWC, and specifically embraced by the Sixth Circuit in *Pennington* (400 F.2d 806, 814) and in second *Ramsey* (416 F.2d 655, 659). Therefore, the District Court again erred in allowing the jury to construe the 80-cent clause, and in holding that it could possibly support an inference of conspiracy.

In weighing the evidence, both as separate elements and as a whole, the District Court ignored the standard applicable to circumstantial evidence. Each of the four categories of evidence the Court mentioned as sufficient to support the verdict (consistent application of the national contract terms since 1950, the "stability" statements by UMW and BCOA officials, the PWC, and the 80-cent clause) "weigh no less equally in favor of unilateral action on the part of the Union than it does in favor of conspiratorial action on the part of the Union" (Second *Ramsey*, 344 F.Supp. 1029, 1038).

As to each element of evidence, the conduct or statement involved is not in itself unlawful, or evidence of conspiracy. In each instance, and taken as a whole, the conduct and statements at issue are perfectly lawful if motivated by unilateral UMW policy, and are unlawful if and only if motivated by conspiratorial agreement. In each instance, and as a whole, the District Court allowed the jury to infer unlawful motivation from the *naked fact* that the conduct occurred, or the statements were made. In so doing, the Court failed to perceive that at *most*, the conduct and statements, singly or as a whole, raise two possible

... was the collective bargaining agreement known as the National Bituminous Coal Wage Agreement, then your verdict would be in favor of the United Mine Workers of America, unless you believe that this agreement was entered into pursuant to a conspiracy." This charge is to be understood as meaning the Court below construed the terms of the 80-cent clause not to constitute a Sherman Act conspiracy.

inferences as to motivation, with absolutely no basis for choice between.

In such a situation, the party with the burden of proof cannot possibly prevail, and as a matter of law, the trier of fact simply has no room to operate, and a jury verdict stands on nothing but rank speculation or prejudice.

The District Court in second *Ramey* correctly grasped this concept (344 F.Supp. 1029, 1038):

As regards the totality of the evidence and the plaintiffs' contentions of a UMW-BCOA antitrust conspiracy, apart from what has been said in this or its former opinion, the Court is of the opinion that the most that can be said without engaging in impermissible speculation is that the motives of the UMW and the motives of the BCOA do appear to have coincided.

The Sixth Circuit has also recognized this concept in *South-East* (434 F.2d 767, 777-8):

It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contra-proposition, the plaintiff has not met his burden of proof. When there are equal inferences which can be drawn from a particular set of facts—one inference indicating liability, the other non-liability—it is the judge's obligation at the direct verdict stage of the trial to find for the defendant. (Citations omitted.) It would not be proper under these circumstances for the trial judge to relinquish to the jury this responsibility by simply giving them an instruction to the effect that if they could not draw either an inference of liability or one of nonliability from the facts presented, they should conclude nonliability.

The District Court erred in refusing to grant UMW either a directed verdict or judgment N.O.V., since *all* the evidence which the Court advances as sufficient to support a jury verdict is at *most* equal inference evidence, and incapable, taken singly or cumulatively, of supporting a verdict for Scotia. In failing to reverse the District Court, the Court of Appeals grievously erred.

In reference to Question 2, involving Scotia's stated ability to pay the wages demanded by UMW, the District Court states in its memorandum that, "While the Bonnyman testimony could be viewed as supporting the interpretation placed upon it by UMW, it does not compel such a conclusion" (A-7). We emphatically disagree. The Bonnyman testimony is crystal clear: Scotia was prepared to agree to the contract and would do so if UMW would agree not to organize its Leatherwood mine. There is no ambiguity about it.

The District Court also emphasizes Bonnyman's testimony that it would have been "disastrous" for Scotia to have met the terms of the national contract (A-6). The reference, we submit, is out of context. See pages 4-5, *supra*. At the time, Bonnyman told Titler the contract would reduce Scotia's profitability and make it a "marginal" operation in light of the "investment". Bonnyman's "disastrous" comment was the product of hindsight without supporting data and without the slightest indication of to what extent or even when this "disaster" would have occurred.

The District Court ignores that one of the necessary elements of recovery is that UMW must have conspired to insist on an agreement "ruinous to the business" of the employer, *Ramsey* (401 US 302, 314), "regardless of the employer's ability to pay." (*South-East*, 434 F.2d 767, 775). In this case the ability was not denied but admitted. The import of the Court's holding is that UMW would be liable for conspiracy damages every time it asked for its standard wages and the employer says, "I can pay it, but I don't want to."

REASONS FOR ALLOWANCE OF THE WRIT

Review should be granted in this case because it presents special and important questions of federal law not settled by this Court. By refusing to consider these questions of first impression, the Court of Appeals has allowed the District Court to decide, and decide incorrectly, questions of Federal law which should be decided by this Court. The Court of Appeals has also so far sanctioned the District Court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Prior decisions of this Court, *Pennington* (381 U.S. 657) and *Ramsey* (401 U.S. 302) mark the Court's awareness of the importance of the special area of Federal law involving application of antitrust laws to labor unions. Although both of those cases dealt broadly with the standard of proof necessary to find a Sherman Act violation by a labor union, *in neither case did the Court deal specifically with the sufficiency of circumstantial evidence to support an inference of conspiracy*. Rather, in each case the Court expressly declined to indicate an opinion on that issue.⁸

UMW is aware that weighing the evidence is the duty of the finder of fact, in this case a jury, and that this Court usually does not concern itself with weighing evidence which has been examined in the first instance by the trier of fact and the Courts below.

⁸ In *Pennington* the Supreme Court said (381 US at 665, fn. 2): There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

In *Ramsey* the Supreme Court said (401 US 303, fn. 5): To what extent the proof would fail under the standard we here hold applicable and what legal difference it might make are matters open to be dealt with on remand.

However, the question here concerning the sufficiency of the evidence is a question of law, an important one not reached by this Court in *Pennington* or *Ramsey*.

It is vital for UMW, other labor unions, and employers to know with as much certainty as possible what conduct is and is not susceptible of interpretation as indirect evidence of conspiracy; to know when circumstantial evidence will be viewed to establish conspiracy as opposed to coincidence of motives. "Otherwise, every employer and every union signing a collective bargaining agreement might well find themselves unavoidably exposed to an antitrust charge." (Second *Ramsey*, 344 F. Supp. 1029, 1039).

The legal question concerning the sufficiency of the evidence involves the "equal hypotheses rule." This Court has not explored this rule in its UMW conspiracy cases, and both the District Court and Court of Appeals unaccountably ignored it in their decisions in this case.

The rule was correctly explained and specifically approved by the Sixth Circuit in *South-East* (434, F.2d 767, 777-8). The rule is simply a negative phrasing of the rule that a plaintiff must sustain his burden of proof:

When there are equal hypotheses, which can be drawn from a particular set of facts, the judge's obligation at the directed verdict stage of the trial to find for the defendant. (at 777)

UMW contends that the rule should have been applied by the District Court to grant either the motion for directed verdict or for judgment N.O.V. As explained in the Statement of the Case, above, each item of evidence advanced by the District Court to support the jury verdict was demonstrably equal inference evidence, at most.

The District Court avoided dealing with this question of law by simply refusing to consider it. Denying that this was a case of first impression, the Court stated that UMW's argument of insufficient evidence to support a jury verdict was no different from those considered and rejected by the Sixth Circuit in *Tennessee Consolidated* and *South-East*. The Court could not have been more greatly mistaken.

Far from rejecting the "equal hypothesis rule," the Sixth Circuit specifically embraced it in *South-East*, as quoted above. The rule was not involved in the disposition of the case, because the Court found direct evidence of conspiracy on the part of two co-defendant operators, consisting of a cancellation of a sales contract between the South-East and Consolidation Coal Companies. The Court of Appeals expressly declined to consider the circumstantial evidence alone, except to allow that it "in and of itself might not support the jury's verdict." (434 F.2d 767, 789). It is irrefutable that had it been necessary to the decision, the Court of Appeals would have applied the equal hypothesis rule.

Furthermore, in a footnote in *South-East*, at page 778, the Court of Appeals makes it clear that the equal inference rule was not considered in its decision in *Tennessee Consolidated*:

It is doubtful that the equal inference instruction given in *Tennessee Consolidated* to the jury was correct. However, this apparently was not assigned as error on appeal as no mention whatsoever is made of that instruction or the propriety of its use in the appellate opinion in the case.

Besides misconstruing the meaning of *South-East* and *Tennessee Consolidated*, the District Court also misinterprets the second *Pennington* (257 F. Supp. 815) and the second *Ramsey* (334 F. Supp. 1029) cases, erroneously stating that they were treated by the District Judges as if there was a conflict in the evidence, with weighing of facts.

On the contrary, Judge Wilson makes implicitly clear in *Ramsey* (at pages 1038-39) that his refusal to engage in "impermissible speculation" as to motivation from conduct and statements productive of two possible inferences is a matter of law and is tantamount to a directed verdict in a jury case. The Sixth Circuit shared this view of Judge Wilson's decision, as evidenced by comments in *South-East* (434 F.2d at 778).⁹ Obviously, the same view applies to Judge Taylor's decision in second *Pennington*.

Therefore, because it is beyond dispute that this case presents the question of application of the equal inference rule to circumstantial evidence in a jury trial, whereas *South-East* and *Tennessee Consolidated* did not; and because it appears that the District Court and Court of Appeals grievously departed from the proper application of the rule, as set forth in *South-East* and applied in second *Pennington* and second *Ramsey*, this Court should settle this question.

The writ should be allowed because the case presents other important questions of first impression. Unlike *South-East* and *Tennessee Consolidated*, this case involves a period of alleged damages dating *after* the removal of the PWC. This Court has not had the opportunity to consider the important question of the extent to which the PWC may form the basis for an inference of conspiratorial conduct occurring after its elimination. The District Court erred in deciding this question, and this Court should settle the issue.

Finally, this case presents another unique and previously unconsidered question, involving Scotia's stated ability to pay the

⁹ The *Ramsey* case relied upon by appellants was a non-jury case. On appeal an observation—not an instruction—made by the District Judge in his opinion was quoted with approval. Since the "equal inference" rule or doctrine is used by the trial judge in deciding the question of whether a directed verdict should be granted a defendant because plaintiff has not satisfied his burden of proof, it is both logical and correct that this rule entered the trial judge's thinking in the non-jury trial in *Ramsey*.

wage demanded by UMW. In none of the related conspiracy cases has there been a comparable issue.

The distinction is vital, because in *Ramsey* this Court said (401 US at 314):

Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards *ruinous to the business of those employers*, it is liable under the antitrust laws for the damages caused by its agreed upon conduct. (Emphasis added.)

The Sixth Circuit expressed the same thought in *South-East* (434 F.2d at 775) with the phrase "regardless of their ability to pay."

The evidence of Scotia's ability to pay is incompatible with such a conspiracy. It is destructive of the required concept that UMW conspired to impose the National Wage Agreement with the knowledge that Scotia would be unable to comply.

Scotia professed not only an ability to pay, but a willingness to pay UMW's requested wage, provided UMW would commit itself not to organize the Leatherwood mine.

Since, a priori, all demands for increased wages have the potential to "damage" the employer by reducing his profit margin, how may the labor union bargain at all in this context if the District Court is correct in its interpretation that "ruinous to the business" means only that the employer suffers damages? Under that reasoning, ability to pay has only the subjective meaning given to it by the employer in each particular case.

In this case, Blue Diamond's own President Bonnyman plainly admitted representing to UMW a willingness to sign the contract on behalf of Scotia. He admitted that he told UMW that "we would entertain the idea of signing a contract subject to

working out certain coal conditions, but we could not afford to do it in the Leatherwood field." That statement can be interpreted in no other way but that *Scotia could afford* to sign the contract. UMW was left with the choice of dropping its fight to gain national standards at Scotia, or obtaining them only at the cost of giving a sweetheart commitment, outside its NLRA mandate to bargain for Scotia employees, to abandon whatever opportunity the Leatherwood employees had for UMW representation.

Under such circumstances, it simply cannot be said that UMW's wage demands were "ruinous to the business" of Scotia. If Scotia was damaged, it was purely because it refused to meet UMW's demands except on its own terms, terms which were, we submit, properly rejected by UMW, and not because of an inability to pay.

Surely, such was not the intent of Congress, nor of this Court, which should consider and clarify this critical issue.

CONCLUSION

By the time of the contract negotiations and strike in this case, UMW had been advised by this Court's *Pennington* decision it had the right to pursue unilaterally and without agreement with any employer group a uniform wage policy.

By then, UMW had divested itself of any interest in West Kentucky Coal Company, the evidence of which had been stressed in the *Pennington* case. It had eliminated the Protective Wage Clause from its basic agreement.

It sought in its Scotia negotiations nothing, either in substance or manner, this Court had said it could not seek.

Still, largely on the basis of remarks of years then well past, of legendary figures in the coal industry—John L. Lewis, George

Love, Harry Moses—each of whom by the time of the dispute had either long since departed this earth or an active role in the industry, a jury was permitted to infer a motivation on UMW's part to do something in an unlawful way that it had the clear right to do in a lawful way.

No Court, in a non-jury case, that has heard anyone of the several UMW Pennington-type antitrust cases has concluded other than that the evidence did not establish a case. That a jury has reached a contrary result under the circumstances discussed herein and involving not a "small" operator of the type who gave origin to this apparently endless line of cases, but rather one of the strongest regional coal companies in the United States, is of manifest significance to the responsibilities and rights of organized labor and warrants the review of this Court.

For the reasons set forth above, Petitioner prays for the issuance of a writ of certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

JUDGMENT—DISTRICT COURT

(Entered August 19, 1975)

This action came on for trial before the Court and a jury, Honorable Pierce Lively, Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation, presiding, and the issues having been duly tried and the jury having duly rendered its verdict awarding the plaintiff the sum of Seven Hundred, Seventy Thousand, Sixty Nine Dollars and Three Cents (\$770,069.03) in damages; and pursuant to Title 15, Section 15, United States Code, it is Ordered and Adjudged that the plaintiff Scotia Coal Company recover of the defendant United Mine Workers of America three-fold the damages by it sustained as reflected in the verdict, a total of Two Million, Three Hundred Ten Thousand, Two Hundred Seven Dollars and Nine Cents (\$2,310,207.09) with interest therein at the rate of 6% as provided by law and its costs of action.

Dated at Lexington, Kentucky, this 19th day of August, 1975.

DAVIS T. McGARVEY, Clerk

By: (Illegible)

Deputy

MEMORANDUM—DISTRICT COURT

(Filed August 30, 1976)

On August 19, 1975 the jury returned a verdict for the plaintiff in this antitrust action in the amount of \$770,069.03. The defendant had made a motion for a directed verdict at the con-

clusion of the plaintiff's case in chief which was renewed at the close of all the evidence. Following entry of a judgment for treble damages the defendant filed motions for judgment notwithstanding the verdict, or in the alternative for a new trial, and the plaintiff filed a motion to amend the judgment to provide for the allowance of attorney's fees. The court was prepared to rule and suggested that a hearing for arguments on all motions be held on September 4, 1975. Counsel for both parties requested that the court not pass on the motions at that time, but that rulings be delayed until the transcript of trial had been prepared and the parties had had an opportunity to brief the issues. The court reluctantly agreed, and now finds itself with the necessity of ruling on these motions without a transcript since the reporter has not been able to furnish it to date. The attorneys were notified on July 19, 1976 that the court would require the pending motions to be submitted on briefs which were to be filed no later than August 10, 1976.

Because of the manner in which counsel chose to present this case, the court does not believe that the transcript is essential to a decision on the pending motions. The issues were developed primarily through the introduction of a large volume of documentary evidence, much of it by stipulation. Since there had been several similar trials, involving different plaintiffs but the same counsel as those who appeared in this case (and a previous trial of this case), the attorneys agreed that a number of exhibits, depositions, interrogatories and answers thereto and other documentary matter would be received as evidence in this case and that the attorneys would read pertinent parts to the jury. Thus we were into the third day of trial before the first live witness was produced by the plaintiff. The court made detailed bench notes of the testimony of witnesses and of objections and rulings thereon both to the introduction of exhibits and with respect to testimony of witnesses who appeared.

Motion for Judgment N.O.V.

In its brief in support of its motion for judgment n.o.v. the defendant has mounted a broad attack on the plaintiff's evidence which boils down to the argument that there is no substantial evidence in the record which shows the existence of a conspiracy between UMW and large coal operators primarily represented by the Bituminous Coal Operators Association (BCOA) to impose the terms of the national coal industry agreement on other non-BOCA operators, including Scotia. This argument would have greater appeal if this were a case of first impression. However, in *Tennessee Consolidated Coal Co. v. UMW*, 416 F.2d 1192 (1969), *cert. denied*, 397 U.S. 964 (1970), and *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (1970), *cert. denied*, 402 U.S. 983 (1971), the Court of Appeals for the Sixth Circuit upheld jury verdicts where the argument was made. While it is true that there are some differences between the proof which the jury heard in the two cited cases and in *Scotia*, in many essential areas the evidence is similar or identical. Furthermore, in two similar cases in which district courts sitting without juries upon remand after reversal on other issues found for the defendants, there was no indication that the defendants were entitled to involuntary dismissals under Rule 41(b), Fed. R. Civ. P., at the close of the plaintiff's cases. Rather, these cases were treated as ones where there was a conflict in the evidence and the findings of the district court were upheld as not clearly erroneous. See *Lewis v. Pennington*, 257 F.Supp. 815 (E.D. Tenn. 1966), *aff'd*, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); and *Ramsey v. UMW*, 344 F.Supp. 1029 (E.D. Tenn. 1972), *aff'd*, 481 F.2d 742 (6th Cir.), *cert. denied*, 414 U.S. 1067 (1973).

One would not expect direct testimony of an agreement to violate the Sherman Act and no such direct testimony was produced in this case. There were direct denials by officials of UMW and BCOA. However, applying the guidelines found in

the opinions of the Supreme Court in *UMW v. Pennington*, 381 U.S. 657 (1965) [*Pennington I*], and *Ramsey v. UMW*, 401 U.S. 302 (1971) [*Ramsey I*], and of the Sixth Circuit in *Tennessee Consolidated*, supra and *South-East Coal*, supra, it appears to me that there was sufficient evidence from which the jury could reasonably infer that an agreement existed between UMW and BCOA or some of its members under which UMW would insist that coal companies which were not members of BCOA would be required to accept the terms of the national agreement or have no contract with UMW. UMW agrees that its insistence on Scotia's acceptance of the terms of the national agreement was nothing more than a continuation of its historic policy of seeking uniformity of wage rates for coal miners throughout the country. Obviously, if the evidence were clearly to the effect that UMW was doing nothing more than unilaterally pressing for a uniform wage policy, there would be no liability to Scotia because of its insistence that Scotia accept a contract embodying this policy. *Pennington I*, supra.

UMW argues that the Protective Wage Clause (PWC) which was inserted into the national contract as a 1958 amendment is not evidence of an express agreement to violate the antitrust laws. In *Tennessee Consolidated*, supra, the Sixth Circuit Court of Appeals found that the PWC is ambiguous and that it was the duty of the jury to determine its meaning. The court also held that evidence of surrounding circumstances and the practical construction of the parties was admissible to assist the jury in interpreting the Clause. I find that the language of the PWC, together with the evidence admitted in this case of the surrounding circumstances and construction placed upon the language of the Clause by the parties, was susceptible of a construction which would support the inference by the jury that an agreement existed in violation of the Sherman Act.

UMW argues that the previous cases in which the Sixth Circuit upheld jury verdicts for plaintiffs involved damage periods

prior to 1964 when UMW claims the PWC was deleted from the national contract. Since Scotia has claimed damages for a period beginning after 1964, it is argued that even if there was evidence of an illegal agreement, the conspiracy terminated with the removal of the PWC in 1964 and Scotia has failed to connect its alleged damages to the claimed antitrust violation. I do not believe that the fact that the PWC was removed from the national agreement in 1964 was determinative of the issues in this case.

There was evidence other than the PWC itself from which an agreement could be inferred. Though the PWC did not appear in the contract after 1964, the conduct of the parties in 1965 and 1966 might be construed as indicating that the underlying agreement which the PWC sought to implement continued implicitly through the period of claimed damages by Scotia. Additionally, the "80-cent Wage Clause" might have been viewed by the jury as a continuation of the underlying purpose of the Protective Wage Clause. See *South-East Coal Co. v. UMW*, 434 F.2d at 782-83. Furthermore, there was evidence that since the formation of BCOA in 1950, the UMW has not approved any bituminous contract except under the national contract terms, and its leaders as well as the leaders of BCOA have publicly expressed a preference for concentration of the coal industry in strong hands.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), the Supreme Court said, "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." The jury was required to look at the evidence as a whole rather than as isolated bits and pieces and I am constrained to view it in the same way in passing on a motion for judgment n.o.v. The jury returned a general verdict for the plaintiff in this case and did not necessarily base its finding of a violation of the

antitrust laws solely or to any extent, upon the inclusion of the PWC in the national agreement.

In its brief UMW also argues that the uncontroverted testimony of the president of Scotia's parent, Blue Diamond, shows that the plaintiff was fully able to meet the demands of UMW at the Scotia mine and offered to do so in exchange for an agreement by UMW not to attempt to organize the Leatherwood Mine which was also owned by Blue Diamond. UMW quotes from *Ramsey I*, 401 U.S. at 313, "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct." UMW argues that the testimony of Mr. Bonnyman shows that the UMW demand was not ruinous to Scotia and that it brought the strike and consequent damages upon itself by asking UMW to violate its principles by agreeing to make no attempt to organize the Leatherwood Mine.

The phrase, "ruinous to the business" does not appear to me to establish an absolute requirement for recovery in this type case. If a conspiracy in violation of the antitrust laws is shown, the victim of the conspiracy should be able to recover its damages whether they result in absolute ruin or not. Moreover, while the testimony of Mr. Bonnyman contains references to the fact that Scotia was a profitable operation at the time of the discussion with UMW in 1965 he also stated that it would have been disastrous for Scotia to have met the terms of the national contract. Though the jury could have viewed the Bonnyman testimony as establishing a totally unrelated cause of Scotia's damages, I do not believe that this testimony, consisting of several pages of questions and answers in a deposition taken in a previous case, completely eliminated every reasonable inference that Scotia suffered damages as the result of an illegal agreement between UMW and BCOA. Though UMW empha-

sizes "the Leatherwood issue" in its brief, the testimony of Bonnyman was not presented at the trial as the one fundamental difference between this case and the *Tennessee Consolidated* and *South-East Coal* cases. Actually, in its brief UMW uses such expressions as "fairly to be inferred" and "in so many words." While the Bonnyman testimony could be viewed as supporting the interpretation placed upon it by UMW, it does not compel such a conclusion.

In ruling on a motion for a directed verdict or for judgment n.o.v. the court is guided by the decision of the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, supra, and by numerous decisions of the Court of Appeals for the Sixth Circuit. In *Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), cert. denied, 44 U.S.L.W. 3471 (Feb. 23, 1976), Judge McCree, writing for the court, stated: "The district court, however, does not sit as trier of fact *de novo*; its function in deciding this motion for judgment n.o.v. was limited to determining whether a reasonable person could arrive at the conclusion agreed upon by the jury." Viewing the evidence in the light most favorable to Scotia, I conclude that there was sufficient evidence to raise an issue of material fact for the jury, *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *Reeves v. Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973), and that a reasonable person could reach the conclusion agreed upon by the jury.

The Motion for a New Trial

UMW argues that the evidence does not support the award of damages in the amount of \$770,069.03. Plaintiff's exhibit 37 showed that Scotia's profit for the 12-month period from June 1965 through May 1966 was \$770,069.03. Though Scotia claimed this loss of profits plus the adjusted losses in-

curred during the period covered by this lawsuit, June 1966 through May 1967, in the total amount of \$972,922.31, the jury could have reasonably concluded that the actual profit for the immediately preceding 12-month period was a fair measure of the damages suffered by Scotia. In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), the Supreme Court held that a plaintiff in an antitrust suit is not required to prove damages with exactitude where the wrongful actions of the defendants have made computation difficult or impossible. The Court held that comparison of receipts in a period immediately prior to the alleged operation of the conspiracy with those afterward was an acceptable measure of damages. The Court further approved the jury's setting damages on the basis of reasonable estimates from the evidence, acting on "probable and inferential, as well as direct and positive proof." *Id.* at 264. In *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 358 F.2d 790 (1966), the Sixth Circuit held that the jury in an antitrust action is not limited to awarding damages for specific items as proven but may award general damages also. I do not find the award of damages to be so speculative as to require a new trial.

In its brief UMW points to a number of evidentiary rulings as bases for a new trial. It complains specifically of a letter from Edward C. Fox to James L. Hamilton dated March 12, 1964. This exhibit was offered during the plaintiff's case in chief and the court sustained an objection to it. The exhibit was again offered by the plaintiff in rebuttal and the court admitted the exhibit under the co-conspirator exception to the hearsay rule. Mr. Fox was president of BCOA and this letter written to a member company of BCOA could, when viewed with all of the other evidence in the case, be seen as confirming the existence of an agreement between BCOA and UMW to deal with the "matter of the competition of those in the bituminous industry who are non-signators of the National Bituminous Coal Wage Agreement"

UMW also complains of the admission of proceedings of UMW conventions and excerpts from UMW journals dating from the 1930's through 1974. This matter was brought up at a pre-trial conference immediately before the start of the trial and the court ruled that a limited number of such items could be introduced to show the historical background of the case. The court sustained objections to any documentary evidence concerning corruption in UMW in the period of 1972-1973 when Tony Boyle's name was so prominently featured in the news media. The court permitted an amendment to the complaint to show that the alleged combination and conspiracy had its origins at the time of the formation of BCOA in 1950 and both UMW and Scotia introduced evidence of occurrences prior to that date. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, supra, the Court criticized the persistent exclusion by the trial court of evidence of activities prior to the beginning of a conspiracy and said that these items should have been admitted to show a course of conduct. Furthermore, in the present case a separate instruction was given that exhibits had been permitted pertaining to events which occurred prior to 1950 for the limited purpose of explaining the historical background of the case and to show the bargaining principles followed by UMW prior to that time. The jury was instructed: "These exhibits are not, of themselves, evidence of an illegal combination or conspiracy and you may not find the existence of such a combination or conspiracy from these exhibits alone."

It is to be recalled that the parties agreed fully on the instructions in the case and in fact requested the court to give the same instructions which Judge Moynahan had given at a previous trial of this case which resulted in a hung jury. There were no objections to the few alterations in the previous instructions which were made by the court at this trial.

Attorneys' Fees

The plaintiff has made a motion for an allowance for attorneys' fees in the amount of \$210,000. This motion is supported by an affidavit of Mr. Rowntree concerning his time and the time of co-counsel. A motion for attorneys' fees is addressed to the sound discretion of the court which must consider factors such as the nature, extent and difficulty of the services rendered; the time spent by the plaintiff's attorneys in the preparation and trial of the case; the attorney's ability, skill and standing in the profession, including his specialized skill in the field of antitrust litigation; the results accomplished in the litigation, and the amounts customarily charged or allowed for similar services within the area. The above is taken from Judge Wilson's opinion in the *Tennessee Consolidated* case. I have considered these factors and the awards which were approved by the Sixth Circuit in *Tennessee Consolidated* and *South-East Coal Co.* and have concluded that a fee of \$150,000 should be allowed in this case.

/s/ PIERCE LIVELY
District Judge
Sitting by Designation

This 27th day of August, 1976

AMENDED JUDGMENT—DISTRICT COURT

(Filed August 30, 1976)

Pursuant to the Court's direction in numerical paragraph three of its Order of August 27, 1976 filed on August 30, 1976,

It Is Ordered and Adjudged that the Judgment entered herein on August 19, 1975 in favor of the plaintiff in the total sum of Two Million, Three Hundred Ten Thousand, Two Hundred

Seven Dollars and Nine Cents (\$2,310,207.09) be and it is hereby amended to provide for an additional allowance of attorneys' fees to the plaintiff in the amount of One Hundred Fifty Thousand Dollars (\$150,000.00) thereby making a total award to the plaintiff, Scotia Coal Company and against the defendant, United Mine Workers of America a total sum of Two Million Four Hundred Sixty Thousand, Two Hundred Seven Dollars and Nine Cents (\$2,460,207.09) with interest thereon at the rate of 6% as provided by law and its costs of action.

Dated at Lexington, Kentucky, this 30th day of August, 1976.

/s/ DAVIS T. McGARVEY, Clerk

ORDER—COURT OF APPEALS

(Filed April 28, 1978)

Before: EDWARDS, PECK, and MERRITT, Circuit Judges.

This appeal, perfected from a judgment entered pursuant to jury verdict in this action brought under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, has been submitted on the record on appeal and on the briefs and arguments of counsel. It is plaintiff-appellee's contention that over a protracted period of time appellant and the major coal companies, especially the dominant members of the Bituminous Coal Operators Association, engaged in a continuous conspiracy to monopolize and restrain trade in the bituminous coal industry and to eliminate competition for the benefit of the major coal companies. Its further contention is that appellant and the major coal companies used the collective bargaining process as a means of imposing costs on smaller coal companies such as the appellee,

thereby eliminating their competition. In response, appellant contends that its consistent policy in wage negotiations, from the union's organization in the 1890's, has been to achieve national uniformity in wage rates and labor standards in the coal industry. The trial court followed the holding of the Supreme Court in *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 91 Sup. Ct. 658 (1971), to the effect that the clear proof standard indicated in the Norris LaGuardia Act, § 6, 29 U.S.C. § 106, was without application. The fact that the Court's instructions to the jury were stipulated by counsel for the parties and agreed upon prior to the giving of said instructions precludes our review thereof. After a review of the record, it is concluded that there was sufficient evidence to permit the case to be submitted to the jury, and to sustain its verdict. Accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk of Court

STATUTES

15 USCA:

§ 1: TRUSTS ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing mini-

mum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, July 7, 1955, c. 281, 69 Stat. 282.

§ 2. MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be pun-

ished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

* * * * *

§ 15. SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized workers is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: ENUMERATION OF SPECIFIC ACTS NOT SUBJECT TO RESTRAINING ORDERS OR INJUNCTIONS

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in

any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

7

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.

FILED

AUG 7 1978

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1978

NO. 78-111

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE
SIXTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-111

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL COMPANY,
Respondent

*On Petition for Certiorari to the United States
Court of Appeals for the Sixth Circuit*

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The decision of the Sixth Circuit was in the form of a brief order and is not reported in the Federal Reports. The trial court rendered a rather full opinion on post trial motions after a jury verdict, and that opinion is likewise not reported.

Jurisdictional Grounds

This is a Sherman Act case based on 15 USC Sections 1, 2, and 15, and this Court has jurisdiction under 28 USC Section 1254 (1).

COUNTERSTATEMENT OF THE CASE

A. THE NATURE OF THE ACTION.

Respondent, Scotia Coal Company (Scotia), a producer and seller of bituminous coal in Eastern Kentucky, brought this case in the United States District Court for the Eastern District of Kentucky, Lexington, against petitioner, United Mine Workers of America (UMW), an international labor union. The suit is based on the Sherman and Clayton Acts (15 U.S.C. §§1, 2 and 15).

Briefly, Scotia charged that petitioner and the Bituminous Coal Operators Association (BCOA), which was organized by Consolidation Coal Company (Consol), the largest producer and seller of bituminous coal in the country in 1950, and others engaged in an unlawful conspiracy in the period of this case (1964-1967) to eliminate and suppress competition and production of all but the largest companies in the coal industry. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended (NBCWA), including the 1950 Supplement containing the Protective Wage Clause (PWC), and the later supplements which contained the 80¢ Welfare Clause, would be permitted to carry on operations. It was alleged that the smaller companies or companies not operating in ideal working conditions could not operate profitably under the provisions of the National Agreement; that those who did not sign were not permitted to operate, and were forced out of business; and that plaintiff was damaged as a result of the conspiracy.

The proof in this case, more than in any of the previous several cases considered by this Court, abundantly supported the jury verdict for plaintiff. The record shows

the main producer associations in the country pooling their efforts and literally forcing the field agents of the dominant union to "stop issuing illegal (below national contract terms) contracts", and causing the spending of hundred of thousands of UMW dollars in doing something (on the prodding by the associations) about the problem of non-union and non-contract coal getting into the markets which was holding the coal price down. Finally the associations (not the UMW as was stated by witnesses in previous cases) got the Protective Wage Clause into the national contract (John Lewis was actually unfavorable because he didn't see how it could work) to get a protection of contract operators and to get "closer cooperation by contract operators" and because the market was so affected by the non-contract low priced coal which was becoming a problem because there "were men who were members of the United Mine Workers effectively opposing interference with their non-contract operations in order to hold their jobs".

The association representatives worked diligently on the Joint Industry Contract Committee alongside UMW International Officers policing the whole industry. The minutes show these representatives carefully kept UMW to its commitment to national contract terms, and then Landrum-Griffen came along and interfered with the PWC boycott. But because of the effect of non-union or non-contract coal on market price there had to be a resumption of restraints, and BCOA was repeatedly saying this to UMW in March 1964. The 1964 contract then became effective April 2, 1964 with the "Eighty Cent Welfare Clause" which was another very effective form of boycott of non-union or non-contract coal.

Because of the conspiracy, Scotia suffered a long and costly strike.

B. THIS COURT HAS PREVIOUSLY CONSIDERED SEVERAL CASES DEALING WITH THE CONSPIRACY CHARGED IN THIS CASE.

On two occasions this Court has heard full arguments and handed down both majority and minority opinions dealing with the charged conspiracy and in several cases it has considered and not granted petitions for certiorari involving the same conspiracy. These cases include *Pennington v. UMW*, 381 U.S. 657 (1965); *Ramsey v. UMW*, 401 U.S. 302 (1971); *UMW v. Tennessee Consolidated Coal Company*, 416 F.2d 1192 (cert. denied 397 U.S. 964); and *South-East Coal Company v. UMW*, 434 F.2d 767 (cert. denied 402 U.S. 983).

C. FIVE JURIES HAVE NOW FOUND THE CONSPIRACY DID EXIST.

In the five cases in which juries were asked to determine whether the alleged predatory conspiracy actually existed in the coal industry, all five have resulted in verdicts in the affirmative. Besides the verdict in this case, there were affirmative verdicts in the "*First Pennington Case*", *Pennington v. United Mine Workers*, 325 F.2d 804, reversed and remanded 381 U.S. 657; *Tennessee Consolidated Coal Company v. United Mine Workers*, 416 F.2d 1192; cert. den., 397 U.S. 964; *Blue Diamond Coal Company v. United Mine Workers*, Civil Docket No. 6189, United States District Court for the Eastern District of Tennessee, Northern Division (no appeal); and in *South-East Coal Company v. Consolidation Coal Company and United Mine Workers*, 434 F.2d 767 (cert. den. 402 U.S. 983).

D. THE INSTRUCTIONS TO THE JURY IN THIS CASE WERE AGREED UPON AND STIPULATED BY THE PARTIES.

Because of the extensive previous history of litigation dealing with the issues raised in this case, the parties were able to agree on the basic legal rules governing the case and the trial court presented a stipulated charge to the jury (440a-443a). This is pointed out in the opinion of the trial court and in the order of the Court of Appeals.

E. THE BRIEF ORDER OF THE COURT OF APPEALS POINTS OUT THAT THE LAW OF THE CASE WAS IN THE STIPULATED JURY CHARGE AND THAT THE EVIDENCE SUPPORTS THE JURY FINDINGS.

The essence of the conclusion of the Sixth Circuit on this appeal is contained in the part of its order which reads:

"The fact that the Court's instructions to the jury were stipulated by counsel for the parties and agreed upon prior to the giving of said instructions precludes our review thereof. After a review of the record, it is concluded that there was sufficient evidence to permit the case to be submitted to the jury, and to sustain its verdict".

COUNTERSTATEMENT OF FACTS

1. *The Combination, Agreement and Conspiracy which Violated the Sherman Act.*
 - (a) *Beginning of the Illicit Agreement and Understanding between UMW and Major Producers in 1950 and Formation of BCOA.*

UMW's policies drastically shifted and changed in 1950. Before 1950 UMW's prime basic policy was the promotion of equality in work opportunity among all of its members with the accompanying and necessary corollary of competitive equality among the coal producers of the industry. These basic purposes and policies were succinctly and clearly stated in some of the minutes of UMW and were being enunciated very strongly in 1948 and 1949 when the struggle was on for new contracts which struggle was finally consummated in 1950 (Exhs. 1, 4 through 12; 66a-97a).

Much of UMW's early history in collective bargaining involved the establishment and adjustment of differentials in wage scales so as to promote equality of working opportunity for members and competitive equality among producers, taking into consideration the nature of coal seams in the various sections and market and transportation inequalities (Exhs. 1, 4, 5; 46a, 66a-78a).

In 1948 and 1949 the growing threat that the industry would become concentrated into a small number of major producers caused violent reaction from UMW (Exh. 6; 78a-82a) and its strikes and three day work weeks in that period were to bring about equal work opportunity and to spread the work among all the members and these purposes are very vividly and clearly shown in the letters of Mr. John L. Lewis to the membership and in the United Mine Workers Journal's articles (Exhs. 7, 8, 9; 82a-86a). As stated, in the period of the 1940's the industry was undergoing some change with respect to methods of production, and mechanical operations were beginning to take over a substantial part of the industry (Exh. 3; 74a-75a). Some major markets for coal were being taken over by gas and oil in the late 1940's (48a-49a).

A basic fact in the coal industry is that coal seams vary greatly in size and adaptability to high productivity, particularly as to being able to use the large and more productive mine machinery with which mining of coal becomes less a matter of labor costs and more a matter of large scale capital expenditures on machinery in thick seams of coal with sufficient reserves to justify such expenditures (155a-156a). This type of mining promoted greater concentration in the industry in the late 1930's and 1940's (156a). The threat of mass unemployment among its members caused great concern on the part of UMW. Lewis was urging the bituminous industry to adopt the production control or spread the work plan which he had instigated and actually set up in the anthracite industry (Exh. 10; 76a-87a). Lewis was urging the bituminous industry to establish a leadership to stabilize the economic side of the industry, saying if the industry did not do it the UMW would (Exhs. 6, 9; 79a-82a, 85a).

The struggles which took place in the industry in that period of time almost brought the country to a stop in its economic life. The President of the United States intervened and new legislation was about to be presented to Congress with respect to the coal mining industry when the National Contract of 1950 was signed (Exh. 12; 94a-97a).

Shortly after the signing of the 1950 Contract Bituminous Coal Operators Association (BCOA) was organized, composed of producers of about 50% of coal production (49a, 96a). This was by the efforts of the largest coal company, Consolidation Coal Company. The officers of Consolidation Coal Company had previously led the industry spokesmen in the bargaining with the Union in industry contracts (Exh. 49a, 90a, 91a). The company's head, Mr. George

Love, testified he had a desire to do what he could to see that no competition paid lower labor costs than Consolidation paid regardless of the competitor's circumstance or mode of production (92a-93a). The representatives of Consolidation Coal Company in the initial meetings of BCOA, because of the tonnage which they represented, had a very large share of the voting power in BCOA (Exh. 13; 98a-101a). The president of Consolidation had previously discussed with Mr. Harry Moses the job of taking over as head of the proposed new organization and shortly after the formation of BCOA Mr. Harry Moses was designated president of BCOA and took over the job of bargaining with UMW in the industry (Exh. 13; 98a-101a, 91a-92a).

From that time the bargaining in the industry has been carried on in secret by a so called two-man bargaining team, Mr. Lewis and Mr. Moses composing the two-man team, and later Mr. Lewis and Mr. Fox. The previous struggles between the industry and the Union no longer occurred and the agreements were arrived at without any necessity to terminate the previous contract or to make any public utterances concerning what was transpiring in the secret conferences (Exh. 15; 105a-108a).

After 1950 the attitude and policy of UMW with respect to equal work opportunity for all of its members and with respect to competitive equality among all coal producers, drastically changed and the stated purposes and policy of UMW was to promote the intensive mechanization of the industry and the concentration of production into fewer units with the express recognition that "more and more of the obsolete units will fall by the board and go out of production" and that the industry was dedicated to con-

tinue the development of the "great combines now being formed in the industry" (Exhs. 19, 20, 30, 31; 115a-116a, 188a-191a).

On the side of the industry, leading spokesmen of the operators who were the representatives of Consolidation Coal Company, had pointed out before 1950 that they had obligations as such fiduciary representatives of the industry to recognize the interests of all of the smaller companies they represented and not just the interests of the major producers, and this concept of fiduciary responsibility was emphasized in the period of 1948 and 1949 (Exh. 11; 89a-90a). However, since the formation of BCOA and the collective bargaining in two-man teams between Harry Moses and John L. Lewis started in 1950, the representatives of BCOA have pushed such concepts aside and Mr. Moses has described his relationship to the industry and to the Union as being part of a "quest for stability" wherein BCOA and UMW decided to get out of the "Kleig-Lights" and make the BCOA organization the mechanism for the settling of "national problems on an authoritative basis" (Exh. 16; 109a-111a).

After the amendments to the 1950 National Bituminous Coal Wage Agreement were negotiated and signed by UMW and BCOA following these secret sessions in the years 1951, 1952, 1955 and 1956 (Exh. 14; 101a-105a), they were put into printed form and sent to the district offices of UMW to obtain signatures of other coal producers not represented by BCOA (50a). Each of these amendments very substantially increased the wage per hour per man across the board in the very same amounts for every coal mining job in the industry. The district officers and field representatives had the responsibility of obtaining signatures of such other coal producers to the printed forms

of the amendments. These local or district representatives had no authority to make any change whatsoever in the printed forms of the contracts. The only body with authority to make any change in the contract was the International Union's Policy Committee which has not approved any change for any producer in any of the national contracts since 1950 (Exh. 17; 112a-113a).

Also in October 1950 the International Union formed the International Organizing Committee to promote an intensified drive through all the non-union areas of the Country (51a). This drive was reported to have great success in the following years in spite of numerous efforts to obtain court relief in the form of injunctions (Exh. 18; 114a-115a).

Because of the flat wage increases across the board for every job, it was a natural and necessary thing that intensive mechanization resulted. With more and more flat increases in costs being added for every man in the labor force, the producers rapidly shifted to the use of machines. Gigantic new machinery was put into the underground mines putting new stresses upon the men, and the stripping of the surfaces of coal lands by monstrous new strip shovels and draglines greatly expanded in the 1950's and 1960's (Exhs. 3, 21, 23, 29, 31; 51a, 74a-75a, 116a, 117a, 190a-191a).

It became the policy of UMW to have the production of coal taken over by big combines and bring about concentration in the industry and this was largely achieved (56a, 188a-189a, 190a-191a).

UMW pursued these policies in spite of the violent reaction of many of its local union delegations at the International conventions, who spoke of the rapid reduction of the

manpower in the industry with resulting enormous and starkly tragic unemployment in the coal producing areas while at the same time the men who were left in the industry in underground production faced new and difficult, dangerous and health impairing conditions by reason of the gigantic new machines that they were having to keep up with (Exh. 23; 167a, Tr. 160-166).

Also in the 1950's UMW commenced to invest many millions of dollars in certain major coal producing companies, and thus in bargaining for national contracts UMW was not only representing UMW members in all the units of production in the industry but it was also standing there as the owner of a major coal company and thus had the resulting inclination of benefiting itself as such owner by designing the contracts to fit the abilities and the interests of major coal companies in the national bargaining (Exh. 22; 118a-122a).

(b) *The Existence of Express and Implied Illicit Agreement is Clear since the Protective Wage Clause of the 1958 Contract, which was followed by the 80¢ Clause in Later Contracts.*

As will be shown below, in the period after the 1956 national contract amendment, UMW and the coal associations turned to the use of restrictive language in the contracts to bar non-union or non-contract coal from markets. In this period the regional associations, Illinois Coal Operators Association and Southern Coal Producers Association, took a prominent part with BCOA.

Plaintiff relies not just upon the express restraints put into the contracts but also upon the *implied understandings* that logically and obviously arose.

- (1) *The Original Reluctance of some of the Regional Associations of Producers such as SCPA to Engage in the BCOA Framework of Bargaining with UMW.*

The Southern Coal Producers Association (SCPA) (of which Blue Diamond was a member until 1957 as discussed above) was composed of a number of coal producers including the largest coal producers in the south, and the association was formed primarily for the purpose of coordinating and unifying the coal producers of the south into one compact organization which would have the strength to deal with UMW in the making of wage agreements and to compete with the northern producers who were more favorably situated as to freight rates, markets and with better natural conditions (47a-48a, 130a-132a, 136a-137a). The association fought vigorously from its founding in 1941 until the 1950's in seeking to avoid having to sign the same contract terms that the northern producers signed with the UMW. The southern producers contended that their conditions were not as favorably disposed as the northern producer's conditions so that they were unable to match contract terms with the northern producers. It was the expressed concern of members of SCPA in that period of time that the reason that the contract terms were pressed upon the southern companies was to eliminate competition of the southern companies because of the more favorable situation of the northern producers (148a-151a). This prevailed at least until the middle of the 1950's and in that period the southern companies were in opposition to BCOA in this regard. However the same contract terms were imposed upon the southern producers and each time BCOA negotiated a contract amendment with UMW the same terms were finally signed by SCPA who had nothing to say

about those terms in the 1951, 1952, 1955 and 1956 amendments (134a-135a, 138a-139a, 140a-143a).

- (2) *The Switch in the Policies of the Regional Association; How the Protective Wage Clause (PWC) of the 1958 Amendment Originated.*

In the 1950's BCOA was concerned about the growth of non-union coal competing in the markets and was urging UMW to do a more vigorous organizing job (147a-148a). The Minutes of SCPA also disclose the growth of competition of non-union operations and in 1955 and later years these minutes show the concern of the members of SCPA (who were signatories to the national contract) with the UMW over the development of this non-union competition. The members of SCPA discussed the possibility of acting against these non-union or non-contract operations, and Mr. Moody, the President of SCPA explained to the membership that he frequently mentioned this problem to Mr. Lewis of UMW who claimed that he was spending hundreds of thousands of dollars on the problem of suppressing the non-union operations who were competing with the signatory operators. SCPA members also claimed that UMW was issuing "illegal contracts to operators" (i.e. contracts at terms below national contract terms) though this was denied by UMW, and the SCPA members demanded that conferences be had with the Union to make some effective headway against these practices. As always the Union responded "give us names and places" with respect to these operations not under the national contract. The president of SCPA testified that Mr. Lewis tried to do something about it but it was difficult to get specific information concerning it and what should be done about it. "It went from outright violence down to conversation but no one ever came up with a real plan that was effective", he said (157a-160a).

In August 1958 this problem was the principal item on the minutes of SCPA and the members were demanding some sort of action. The minutes show: "Mr. Lewis had expressed his concern and was open to constructive suggestions to better the situation. Mr. Moody said: 'I had a meeting with Mr. Lewis last week which lasted several hours and this was one of a series I have had commencing with your request two months ago that I discuss our problems with him.'" (160a-161a).

Mr. Moody, formerly president of SCPA and later president of BCOA, testified as to how the Protective Wage Clause (PWC) came into being. This was a part of the 1958 amendment to the national contract. He said:

"I discussed it with Mr. Lewis. He was not very favorable at the time, mainly because he did not see just how it could be done. Well, I talked to him a couple of times more and said that I thought that it would give a central place of consideration of administration and would be helpful. And I mentioned to him this problem, that my people were becoming very adamant on their demand that something be done about the noncontract coal. And I don't know the time factors in here, but at another meeting it was talked about and there was one day I was over talking with Mr. Lewis and he showed me two papers which purported to be what we later called a protective wage clause—in other words a protection of the contract operators. One of them was in left field and one of them was in right field. I did take them and brought them up here—not to this place but to our counsel—. . . . (the Welly Hopkins of UMW and the Ed Fox of BCOA drafts)

"Well, the basic approach of each was the same. It was to work out some method of closer cooperation by contract operators. However their approach to the thing was wide open and I have forgotten the difference on the thing. That is why I was hesitant about discussing the matter. But I brought it to counsel and asked them, one, for advice of counsel on the legality of such a thing and, two, would they redraft it to see if they could bring up something that was bright-eyed and shiny because Mr. Lewis said 'if you have any bright ideas let's see how smart you are'. My memory is that is what happened. And we brought them back and the Protective Wage Clause that was put into the contract was pretty much what was written in this law office including the licensing and so forth that went with it." (163a-164a)

Mr. Moody also explained in the minutes of SCPA the theory behind the PWC as follows:

"In the promulgation of this contract over the years and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole, had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics, there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields.

The law of supply and demand took over and we discovered that the labor price established by the contract, was not the price established by the number of miners available for work. The situation encouraged the establishment of mines, not under the union contract. This also presented the Union with a problem, as they found men who were members of the United Mine Workers, effectively opposing interference with their noncontract operations in order to hold their jobs. Therefore, the Union found it was unable to carry out major organizing campaigns. Lastly the coal market was rather seriously weakened as far as price was concerned as there was a premium on noncontract, low priced coal." (165a-166a)

Some time before the PWC was signed Joseph Moody as head of SCPA was conferring with Mr. Hamilton Beebe of the Illinois Coal Operators Association about the terms of the PWC (165a).

At the same time Mr. Fox of BCOA and Mr. Kennedy of UMW were exchanging drafts of a proposed protective wage clause. Mr. Hopkins testified, and UMW answered interrogatories, to the effect that the operators demanded Paragraph "A" of the PWC (128a, 339a-340a).

The men who became members of the Joint Industry Contract Committee under the PWC in 1959 were these same men, that is Mr. Fox, Mr. Moody and Mr. Beebe, for the coal operators and the International officers of the Union for the United Mine Workers (Exh. 27; 127a).

(3) *The Language of the PWC and the History of its Enforcement. Contest of PWC under the Labor Law. Substitution of the "Eighty Cent Welfare Clause".*

The PWC was an amendment to the National Bituminous Coal Wage Agreement of 1950 made in December, 1958 (Exh. 24). In the introductory paragraph of PWC all of UMW's local branches and agents (and this would include the field representatives) were included in the definition of "United Mine Workers of America," and this paragraph expressly binds the Union as thus defined to exercise all possible efforts and means to attain the objective of having the national contract terms observed in all bituminous coal mines (Exh. 24; 123a-124a).

Paragraph A, which was demanded by the associations, reads:

"During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." (124a)

Paragraph B of the PWC required signatory operators and affiliated corporations to boycott coal produced without compliance with the national contract. It also provided that the clause "covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate" (124a-125a, Exh. 24).

Paragraphs C and E of the PWC established a "Joint Industry Contract Committee" (JICC) to act as a tribunal to try UMW or any operator for violations of the duties contained in the PWC (125a).

Paragraph D required UMW to report "complete" lists to the JICC of the names of "all" of the operators "whose operations are under contract with the Union." A signatory operator was not subject to trial for buying or dealing in coal produced by any operator on this list reported by the Union unless the operator had previously been found not in compliance with the contract.

Paragraph E required UMW to make available to the JICC "all contracts, agreements, or understandings entered into by the United Mine Workers with any person engaged in the production of bituminous coal" and to make its appearance before the JICC on request in case of investigation of alleged violations of the PWC (125a-126a).

In the first meeting of JICC on January 21, 1959, (page 29a) of the minutes (Exh. 27), it is said:

"The Committee next considered and authorized the release of a public announcement of the Committee's establishment and organization under the terms of the 'Protective Wage Clause'."

The next issue of United Mine Workers Journal, February 1, 1959, at page 9 carried such a public announcement including this statement:

"The UMW also agreed, in the clause, that it would not make any agreement on wages, hours or conditions of work on any basis other than is specified in the contract" (Exh. 25; 126a-127a).

The minutes of the JICC, whose members, as stated, were the men who formulated the language of the Clause, show that the district presidents of UMW were required to send in lists to the JICC certifying that each list was a "complete list of all operators and mines engaged in the production of bituminous coal within this district . . . , and whose operations are under contract to the said Union". These lists were added to from time to time, as new contracts were made (Exh. 27; 178a).

The JICC sent out demands to all of these companies (that is all companies who had a labor contract of any kind with UMW) that they send back certification of compliance in the prescribed form, —that is, that they were paying the national contract scale and welfare royalty and had "complied fully with the other provisions of the said national agreement" (Exh. 27; 178a).

Hundreds of companies did not send back the certifications, and, after a second letter of warning, formal determinations were made and recorded of violation of the Protective Wage Clause on the part of 1,328 coal operators across the country, the determination being that every such producer "has violated the Protective Wage Clause" of the 1950 contract as amended, and:

". . . has failed and refused to comply with its obligation under such clause to certify in writing

to the Committee that it is in full compliance with all of the terms and conditions of such agreement." (Exh. 27; 179a-182a)

The Landrum-Griffen Act with its "hot-cargo" or secondary-boycott provisions was passed by Congress in September, 1959. The JICC had been at work several months and was getting its enforcement program into high gear. But the new act cast doubt upon the legality of the boycott contained in Paragraph B. Because of this, JICC passed a resolution on November 4, 1959, suspending enforcement of the boycott pending clarification of the legal situation (Exh. 27; 182a-183a).

One of the two main aspects of the resolution of the Joint Committee suspending its formal activities in enforcing the boycott under Paragraph B of PWC, was an attempt to afford operators with a defense to treble damage antitrust cases based on the boycott called for by Paragraph B. Thus Mr. Lane, attorney for both Southern Coal and the JICC reported to the Southern Coal membership on November 9, 1959, about the suspension resolution as follows:

"2. In the event signatory operators are confronted with the possibility of lawsuits—including antitrust treble damage suits—or other disputes or issues pertaining to the subject matter of the Protective Wage Clause, they are now possessed of an official document with important defensive aspects and which in numerous cases may well be importantly instrumental in protecting the position of signatory operators." (172a-173a)

There was no intention of suspending the parts of PWC about which plaintiff complains in this case—Paragraph

A and other parts which put restraints on the Union's bargaining policy. Thus, Mr. Moody, one of the members of the Joint Committee, reported back to the Southern Coal meeting of November 9, 1959 about the suspension resolution:

"(Mr. Moody read the Resolution) Mr. Moody called attention to the fact that one of the discussions that took place was that the Protective Wage Clause, hereby made inactive, has two sections, Section A and B. Mr. Moody said that Section A (the Union obligation) was discussed; that Section A does not appear to be affected by the new law as far as could be determined at this time; and that if any ruling under Section A is desired, action can be brought before the committee and the committee will consider it. In other words it is still possible to process a Section A matter and the members of the committee will be available for that consideration." (Parenthetical matter as well as the rest of the quote is part of the minutes of Southern Coal). (172a)

A subsequent special meeting of the Joint Industry Contract Committee late in the 1960 (Minutes of meeting of July 27, 1960, page 2) continued this policy, the minutes of the Joint Committee stating:

"The Chairman (Mr. John L. Lewis) stated that the principal purpose in calling the special meeting of the Committee was to further consider the resolution passed by the Committee on November 4, 1959. There was a general discussion by all members of the Committee as to the rights, duties, obligations of the Committee under the Protective Wage Clause with due regard to the congressional action taken in September, 1959. It was pointed out by counsel

present that certain provisions of the Protective Wage Clause were not affected by the Labor-Management Reporting and Disclosure Act of 1959 and that it was not only the right but the duty of the Committee to continue to function as an instrumentality for the advancement of the interest of the contracting parties to the National Bituminous Coal Wage Agreement." (Exh. 27)

The JICC met occasionally until 1964 (Exh. 27).

Ultimately JICC authorized attorneys to represent the members in any proceeding challenging PWC and a NLRB case was filed (Exh. 27). It was founded on Landrum-Griffen and had nothing to do with antitrust law (185a).

It is evident the interruption in the work of the committee by Landrum-Griffen was having its effect on the UMW's organizing effort. On March 12, 1964, Fox of BCOA wrote the president of Island Creek Coal Company, largest southern company in Southern Coal:

"Dear Jim: Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signatories to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40-cent royalty has been discussed on many occasions with the United Mine Workers.

"I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only

to the coal companies, but to the United Mine Workers of America as well.

"It is most difficult to meet any demand made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands" (Exh. 39; 436a-437a).

Another provision against non-union or non-complying coal was inserted by UMW-BCOA in the 1964 amendment to the national contract in the month following the above quoted letter of Mr. Fox. This was the "Eighty Cent Welfare Clause" (Exh. 28). This provision reads:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition." (Exh. 28; 186a-187a)

Not only did the foregoing language force all companies which were affiliated with a signatory operator under the contract terms, but also the section of the 1964 contract

entitled "Application of Contract to Coal Lands" carried forward the provision from Paragraph B of the Protective Wage Clause that "this agreement covered the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate" (Exh. 28, Pages 2 and 3).

The language in PWC and the Eighty Cent Welfare Clause contributed great difficulties in the marketing of coal by a company, such as plaintiff, which did not operate under the national contract (55a, 302a-303a).

By this time most of the smaller and middle-sized companies in the coal industry were in extremely difficult financial straits, just as Blue Diamond was, under the national contracts with these kind of restraints written into them. As Mr. George Love confirmed, in his testimony, the two largest companies, Consolidation Coal Company and Peabody Coal Company could well afford to pay the contract terms with the welfare burden and were still in good shape with combined net income of \$43,000,000 (in 1959). After subtracting that income of Consolidation and Peabody, the statistics of the industry showed that the other companies making profits had combined income of \$25,000,000, while the great mass of deficit companies had a combined loss of \$37,400,000—or a net loss for the whole industry, after subtracting Consolidation and Peabody, of \$12,500,000 after they had paid \$105,200,000 into the welfare fund under the contract (366a-368a).

(4) *In the Period of this Case and Since the Landrum-Griffen Act UMW and BCOA Struggled to Sustain the Legality of the Express Boycott Restraints of the National Contract Challenged under the Act but They were Reluctant to Disclose whether the*

Express Restraint on UMW's Bargaining Freedom had been Dissolved; the Implied Restraint Clearly Remained.

We have shown above the fact that the representatives of UMW and the major associations on the Joint Industry Contract Committee carefully avoided eliminating the understanding under Paragraph A of PWC when they suspended the enforcement of the Paragraph B boycott at the time of the passage of the Landrum-Griffen Act. The understanding expressly arrived at was that the restraints on UMW's bargaining freedom would be maintained.

UMW has contended the 80¢ clause entirely superseded the PWC in 1964 by reason of the introductory language of the contract of that year but the national contract of 1964 failed to make any express reference to the PWC of the 1958 contract (Exh. 28). Rather what was done by UMW and BCOA was not to refer expressly to their previous written commitments contained in the introductory paragraph and in Paragraph A of the PWC and make it clear they were releasing each other, but they carefully avoided that approach. The arrangement they made was to use the beginning language of the 1964 agreement to make it possible for them to claim later, if they should get in trouble, that they had taken PWC out of the contract indirectly and without express reference by relating the 1964 contract back to the 1952 contract which antedated the PWC and attaching the 1964 amendments on to that earlier contract.

But as shown above, another form of boycott was inserted in the 1964 contract in the Eighty Cent Welfare Clause right after BCOA had told UMW something more had to be done about the non-union or non-contract coal (Exh. 39).

If UMW was released from its restraints it was obviously not clear to the rest of the industry which had to live with the question of whether the basic understandings between UMW and the major associations as expressed in the 1958 PWC had been modified in the secret bargaining. Some of UMW's own local members who attended the negotiations between UMW and Scotia and who were UMW witnesses in this case testified they understood from UMW officials that UMW would make no contract except the national contract (387a, 395a). In spirit and in practice it was evident there was no modification in basic understandings about UMW's lack of freedom to bargain.

According to the answers to interrogatories, the UMW and BCOA representatives continued their strenuous efforts to have the legality of the PWC and 80¢ clauses under labor law sustained in the NLRB case in Washington. This effort was continuing in the period of this case in 1966 and 1967 (185a).

It would be illogical to assume, and hard to believe, that UMW and BCOA and the other associations had abandoned or terminated any of their implicit understandings with respect to restraints previously agreed upon when they were still striving to sustain the validity of the part of those restraints challenged under Landrum-Griffin in the period of this case. It would take strong proof to show that there was an abandonment of the restraints upon UMW's bargaining freedom and it would require proof that this information was clearly and broadly disseminated throughout the industry so that those involved and concerned (but not participants in the secret bargaining) would know what the situation truly was.

2. *The Impact of the Illicit Combination Agreement and Conspiracy upon Plaintiff.*

Scotia was organized in 1961 by Blue Diamond to operate the Scotia Mine at a time when Blue Diamond (which for many years had operated a number of UMW mines in Virginia, Kentucky and Tennessee) had only one other mine left—the Leatherwood Mine, which was losing money and which was the last mine in its area, the Hazard Field of East Kentucky, to live under the terms of the UMW national contract (53a, 55a). Blue Diamond had gotten out from under the UMW contract by the time of the 1964 contract (53a-54a). The miners in the Scotia Mine were represented by Southern Labor Union (226a). The Scotia Mine was Blue Diamond's only source of profit by 1964 (55a).

In 1965 UMW came in to conduct an organizing campaign at Scotia and succeeded in winning an NLRB representation election (56a, 226a). Upon UMW's demand for a contract at Scotia there commenced a series of six meetings from March 18 to July 27, 1966, between UMW representatives and Scotia officials discussing contract terms. At all these meetings the UMW delegation was headed by William Turnblazer, President of UMW's District 19 (226a-236a).

At these meetings Scotia made various written proposals for increases in wage terms. Scotia pointed out that the UMW demand for welfare payments per ton of coal at Scotia was equivalent to \$300.00 per month per man which was beyond reason and practicability to spend for the kind of benefits received and Scotia presented written proposals from insurance companies for equivalent benefits at below 10¢ per ton or a fraction of the cost of the national contract. UMW never presented any counter proposals

that were not equal to or greater than national contract terms. The last meeting was with a representative of the Federal Mediation and Conciliation Service present and the meeting broke up without any change by UMW in its demands (226a-236a).

With these meetings ending up with the parties poles apart Gordon Bonnyman, then president of Blue Diamond and Scotia, had some sessions with George Titler, vice president of UMW and a session with Tony Boyle, president of UMW. These meetings were likewise unsuccessful, and are discussed below in the argument under questions 2 and 3. Under national contract terms the Scotia Mine might have made a profit if it were not for the forty cents per ton welfare requirement. The welfare terms would put Scotia into a loss position with a heavy investment there. Subsequent events proved that it would have been disastrous to have signed the national contract (56a-57a, 299a-300a).

In the meantime on June 1, 1966, after the meetings had been going on almost three months, a picket line was established by representatives of the union at the entrance to the mine. The miners did not cross the picket line and mining operations stopped (57a, 194a, 200a-201a, 236a-237a). At least some of the men would not cross the picket line because of fear (195a, 221a).

A UMW local union had been organized for the mine, and the men went there to hear the district officers deliver pep talks and relate that the company was being drawn nearer and nearer to signing the national contract (195a-196a).

Pickets were paid a weekly amount by District 19 which was receiving supporting funds from the international

union. The men were required to picket to receive these funds (194a, 197a).

District 19 held at least one area meeting with international participation to stir up support and enthusiasm for the strike (194a, Exh. 34).

After the sixth fruitless meeting between Scotia and UMW representatives, on June 10, 1966, Scotia sent out a letter to the miner employees stating that work was available at Scotia and stating the terms of employment, which were the same terms as offered by Scotia at the last meeting with UMW. The letter also stated that there seemed to be an impasse in the negotiations, but Scotia remained willing to meet with UMW if UMW had good faith modified proposals for consideration (Exh. 35; 197a, 235a, 237a).

Then on July 12, 1966, a group of 23 men, waiting until the picket line was at its weakest, formed a convoy, came through the picket line and went to work (198a, 203a, 208a, 221a, 237a). For many months after that there was massive picketing. Some of the working employees lived on the mine premises and some organized a system of automobile convoys to enter and leave the mine. There were the kind of altercations, threats of violence, name calling, display of firearms and tacks thrown in the driveway, that might be expected from the daily confrontations of these convoys with the massed pickets (198a-202a, 212a-213a, 217a-218a, 224a, 237a-239a).

It required some twelve months for Scotia to restore its production to the pre-strike level. It was difficult to obtain men to replace the men lost after the picket line was established. Training of new men required a

lot of time to obtain tolerable efficiency and safety (205a-210a, 221a-223a, 240a).

3. *Damages.*

The damages suffered by plaintiff Scotia are shown in Exhibit 37 (457a-462a). This is basically a comparison of profit of Scotia in the 12 month period before the strike and the 12 months period after the strike started, during which latter period Scotia was struggling to recover from the effects of the extended shutdown and loss of its crews and while Scotia was vainly trying to negotiate practical and workable terms, but (as Mr. Hoffman, Scotia's President, testified) was denied its "right to bargain so that you have knowledge that you are going to make money, some money, without accepting someone else's contract that we didn't have anything to do with" (65a).

There was some small difficulty in presenting a comparison of two 12 month periods which did not coincide with the fiscal year of the company. Scotia's fiscal year ran from April 1 to March 31. The strike started June 1, so the two periods being compared start June 1.

There was also some small difficulty in making adjustments so that the representation of the two periods would be on a consistent basis. Thus adjustments had to be made for allocation of overhead costs (which were habitually made on a tonnage basis between Blue Diamond's affiliated operations) when Scotia's tonnage greatly dropped because of the strike.

An adjustment was made to compensate for a change made during the second period in basis for depreciation on fixed assets at Scotia (habitually calculated on the basis of amount estimated reserves of coal), there having

been an increase on the company's books in the estimated reserve during the second period.

Also, adjustment was made for increased labor cost in the second period because of the increased rate of pay granted by the company, in order to make the comparison consistent.

Exhibit 37 makes these various adjustments and Scotia's secretary explained these various matters as well as the entire exhibit (242a-244a). The comparison reflects a difference in profits as between the two periods of \$972, 922. The jury did not find damage to this extent, but concluded that because of UMW's illegally handcuffed position in bargaining Scotia was damaged in an amount equivalent to the amount of profit made by Scotia in the first period, or \$770, 069.03 (456a).

ARGUMENT

A. THERE CAN BE NO ISSUE AS TO WHAT THE GOVERNING LAW IS, BECAUSE THE JURY WAS INSTRUCTED ACCORDING TO THE REQUEST AND STIPULATION OF THE PETITIONER.

The jury charge given by Judge Lively was the charge requested by UMW and agreed to by Scotia and it was pretty much the same charge which had been given in the first trial of this case by Judge Moynahan when there was a hung jury. Neither party objected or excepted to any part of the charge (440a-443a). The reason there could be agreement about what the governing law was is because of the thorough development of the law in the previous cases upon this alleged conspiracy which were considered in the Court of Appeals and the Supreme Court.

B. IN THE LIGHT OF THE HISTORY OF THE PREVIOUS CASES THERE CAN BE NO SUCCESSFUL CONTEST OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE VERDICT AS TO EXISTENCE AND CONTINUANCE OF THE CONSPIRACY.

The Court may rest assured that all of the important evidence about conspiracy and combined action against competition participated in by union and big business in the coal industry has been used in this record. In addition there has been used for the first time certain newly discovered minutes of meetings, correspondence and testimony of actual participants which make the existence of the conspiracy beyond question. In other words the evidence of intentional and deliberate anticompetitive conduct violative of the Sherman Act as interpreted by the Supreme Court is stronger and more believable than in the previous cases. The jury was all the more justified in believing our contentions.

With regard to arguments of petitioner about insufficiency of the evidence the Trial Judge, Judge Lively, said in his memorandum filed upon post-trial motions in the District Court:

"... in *Tennessee Consolidated Coal Co. v. UMW*, 416 F.2d 1192 (1969), cert. denied 397 U.S. 964, (1970), and *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (1970), cert. denied, 402 U.S. 983 (1971), the Court of Appeals for the Sixth Circuit upheld jury verdicts where the same argument was made. While it is true that there are some differences between the proof which the jury heard in the two cited cases and in *Scotia*, in many essential areas the evidence is similar or

identical. Furthermore, in two similar cases in which district courts sitting without juries upon remand after reversal on other issues found for the defendants, there was no indication that the defendants were entitled to involuntary dismissals under Rule 41(b), Fed. R. Civ. P., at the close of the plaintiff's cases. Rather, these cases were treated as ones where there was a conflict in the evidence and the findings of the district court were upheld as not clearly erroneous. See *Lewis v. Pennington*, 257 F. Supp. 815 (E.D. Tenn. 1966), aff'd, 400 F.2d 806 (6th Cir.), cert. denied, 393 U.S. 983 (1968); and *Ramsey v. UMW*, 344 F. Supp. 1029 (E.D. Tenn. 1972), aff'd, 481 F.2d 742 (6th Cir.), cert. denied, 414 U.S. 1067 (1973)." (33a)

The Order of the Sixth Circuit recites that that Court reviewed the record and found that the evidence supported the jury verdict.

As to any contention that the conspiracy was abandoned by the period of damages in this case, 1966-1967, our Counterstatement of Facts, Part 1 (b) 4 above, discusses at some length the proposition that it would be hard to believe that the conspirators had abandoned their conspiracy or the implicit understandings in the PWC in the period of this case in 1966 and 1967. We refer to that discussion at this point.

Judge Lively said in his Memorandum filed below:

"UMW argues that the previous cases in which the Sixth Circuit upheld jury verdicts for plaintiffs involved damage period prior to 1964 when UMW claims the PWC was delated from the national contract.

Since Scotia has claimed damages for a period beginning after 1964, it is argued that even if there was evidence of an illegal agreement, the conspiracy terminated with the removal of the PWC in 1964 and Scotia has failed to connect its alleged damages to the claimed antitrust violation. I do not believe that the fact that the PWC was removed from the national agreement in 1964 was determinative of the issues in this case.

"There was evidence other than the PWC itself from which an agreement could be inferred. Though the PWC did not appear in the contract after 1964, the conduct of the parties in 1965 and 1966 might be construed as indicating that the underlying agreement which the PWC sought to implement continued implicitly through the period of claimed damages by Scotia. Additionally, the "80-cent Wage Clause" might have been viewed by the jury as a continuation of the underlying purpose of the Protective Wage Clause. See *South-East Coal Co. v. UMW*, 434 F.2d at 782-83. Furthermore, there was evidence that since the formation of BCOA in 1950, the UMW has not approved any bituminous contract except under the national contract terms, and its leaders as well as the leaders of BCOA have publicly expressed a preference for concentration of the coal industry in strong hands." (34a-35a)

In response to the request of UMW and agreement of the parties (see 440a-443a), Judge Lively charged the jury:

"Once an illegal agreement, combination of conspiracy has been established, an abandonment of

the unlawful understanding may not be lightly inferred." (448a-449a)

This was in conformity with many cases under the Sherman Act. See: *Park, Davis and Company v. United States*, 362 U.S. 29, 47-48; *United States v. W. T. Grant Company*, 345 U.S. 629, 633; *Hartford Empire Company v. United States*, 323 U.S. 386 at 407; *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, at 119.

C. IN REPLY TO UMW'S FIRST QUESTION, UMW HAS IGNORED COMPLETELY THE BULK OF THE RECORD ON CONSPIRACY INCLUDING MUCH NEW EVIDENCE INTRODUCED FOR THE FIRST TIME FROM MINUTES OF MEETINGS, CORRESPONDENCE AND PUBLIC STATEMENTS WHICH PROVES BEYOND QUESTION THAT UMW HELPED FASHION THE RESTRICTIVE APPARATUS AND KEPT IT GOING THROUGH THE PERIOD OF THIS CASE FOR THE PURPOSE OF AIDING THE BIG ASSOCIATIONS TO KEEP COMPETING COAL OUT OF THE MARKETS TO HOLD PRICES UP. ARGUMENT ABOUT "COINCIDENCE OF MOTIVES" AND "EQUAL HYPOTHESIS" IS MEANINGLESS ON SUCH A RECORD.

We have set forth above our counter-statement of the facts. We had to do this at length because UMW has presented the facts in such a way as to present a question based on insufficiency of the evidence under contentions about "coincidence of motives" and "equal hypothesis".

But it is not appropriate to bend the facts to fit a contention made in a petition for certiorari. That is a waste of time and can lead to improvident granting of review.

There is no (there could be no) contention by UMW that the Court did not fairly present to the jury the law about "coincidence of motives" or "equal hypothesis" because the Court gave the jury instructions requested by UMW and agreed to by Scotia. It is simply that UMW presents the facts on appeal in a way to make its contentions plausible.

But in this record there is an abundance of evidence about why the restrictive system was put in and why it was continued through the period involved here. It was for the jury to weigh this evidence under the charge requested by UMW and given by the Court. This is what was done, and the jury found that the well documented proof about anticompetitive purposes motivating the conspirators was true.

D. IN REPLY TO UMW'S SECOND QUESTION, THE MEANING UMW GIVES TO THE VISITS OF SCOTIA'S FORMER PRESIDENT TO THE UMW'S INTERNATIONAL OFFICERS AND THE WORDS SAID ARE CONTRARY TO REASON, PARTICULARLY IN LIGHT OF THE CIRCUMSTANCES AND THE REST OF THE RECORD ABOUT PROFITS AND LOSSES AND EFFECT OF THE NATIONAL CONTRACT. THE JURY REJECTED UMW'S INTERPRETATION OF THESE VISITS BASED ON OVERWHELMING EVIDENCE CONTRARY TO UMW'S CONTENTIONS.

1. *The True Background of the Bonnyman Visits.*

The evidence about the visit of Gordon Bonnyman, former President of Blue Diamond, to George Titler, UMW's Vice President, and what was said there, comes from a deposition of Bonnyman in another case which did not pertain to the Scotia Mine. The strained nature of the UMW contention and construction of the conversation is indicated by the background of it.

Our Statement of Facts above shows the effects of the National Bituminous Coal Wage Agreement upon the whole industry. After subtracting the profits of the two largest coal companies, Consolidation and Peabody, the rest of the industry combined was losing \$12,500,000 after paying \$105,200,000 to the UMW Welfare Fund (366a-368a).

Blue Diamond itself had previously operated a number of deep lines in Virginia, East Kentucky, and Tennessee, but these had passed into the non-profitable category and gone out of existence leaving only the Leatherwood Mine, the last mine of any operator to carry on under the burdens of UMW's national contract in the whole Hazard Field of

East Kentucky, until it was losing heavily and Blue Diamond got out from under the contract. It had refused to sign the 1964 contract.

Scotia was the source of profits for the Blue Diamond operation (53a-55a). There was no way for Blue Diamond to return to the UMW-BCOA fold by acquiring the type of coal land and reserves essential to national contract operations. This kind of land was by now contained in the reserves of the major companies (281a-283a).

It was with this kind of background that UMW came and gained recognition at Scotia and tried to bring the unit back under the national contract. The record shows UMW had never approved of a change in a single contract from the terms of the BCOA contract since 1950 (112a-113a), although there were the "illegal contracts" or "Sweetheart contracts" made by some UMW agents in the field which are mentioned in the minutes of SCPA and broadly known to exist before the big associations put a stop to any special arrangements made by UMW agents (157a-160a; 286a-287a).

In the light of this background it would be natural for Blue Diamond and Scotia to view the prospects of successful bargaining with UMW at Scotia in a pessimistic light. Obviously there was really no chance of anything happening except what did happen. As UMW's petition says at page 4 after six meetings, three after the strike started, the negotiations broke down and the parties "remained poles apart". To hold damages down it was imperative that some more extraordinary effort be made and the efforts Bonnyman made along this line is what UMW now criticizes.

2. *Scotia's and Blue Diamond's Survival Depended on Changing the UMW Contract Terms Covering "Affiliated Operations" as Well as the Scotia Mine, or Weathering the Strike. The Whole Blue Diamond Operation had to be Considered in Relation to National Contract Terms by Reasons of the Express Restraints Contained in the Contract.*

The dependence of the Blue Diamond affiliated group upon the Scotia Mine to make some profit is clear from the record. The Leatherwood employees as well as the Scotia men were dependent on this profit because of Leatherwood's losses, and the stockholders, consisting mostly of employees and retired employees and their families, were dependent on the Scotia profits for some return on their \$19,000,000 or \$20,000,000 equity investment (53a-55a, 64a).

The overreaching effort of the BCOA-UMW unit to close out non-union and non-contract coal from the markets had resulted in the express restraints in the face of the national contract which made it necessary to consider and evaluate the impact of a national contract signature upon the various parts of an affiliated group of companies—not just upon a single mine.

Blue Diamond and Scotia were closely affiliated. Scotia was wholly owned by Blue Diamond and they had the same officers and directors (43a). They shared the same offices and personnel for general mine administration and sales of coal (243a, 459a).

The PWC had provided in the 1959 contract that a signatory would conduct its operations so as to comply with the contract whether operations were by the signatory or by an affiliated company, and that the contract covered

the operation of all lands and facilities of the signatory and any affiliated company (125a). This provision was carried over into the 1964 contract (Exh. 28, Pages 2 and 3).

Also in the 1964 contract was added the "Eighty Cent Welfare Clause" which imposed the eighty cents per ton penalty for marketing non-contract coal not only upon the signatory but also any affiliated company (186a-187a).

It is not reasonable to expect the Blue Diamond's officers to sign such a UMW contract acting as Scotia's officers without trying to get some change or express understanding that would eliminate the broad coverage of these words. As Bonnyman testified, "Anybody who had any financial responsibility would not undertake to sign a contract and then not live up to it." (286a-287a).

Bonnyman was familiar with the broadening out of the application of the boycott and restraint policy against non-contract companies through the use of pressure on parent companies after their subsidiaries were signed under the national contract. This had been recently brought forcefully to his attention with respect to the steel companies, and their captive company signatories, both with respect to purchase of non-contract coal by a parent company and allowing coal land of a parent company to be used by a non-contract operation Blue Diamond had been boycotted under these terms (302a-303a).

The main part of the Bonnyman meeting with Titler at Pittsburgh appears to have been concerned with the contract restraints as applied in the situation of enforcement through parent companies after captive company signatures (299a). The importance of this to Blue Diamond is obvious. The 30¢ to 40¢ extra demanded by UMW from Scotia for welfare meant \$315,000 to \$420,000

extra expense for Scotia's 1,050,000 tons and the 80¢ penalty meant over \$2,000,000 for affiliated non-contract coal tonnage on 2,570,000 tons (459a), all this being extra expense because of Scotia's signing a national contract—a total of over \$2,315,000.

The Bonnyman deposition had to do with an entirely different case and a different time but it does disclose that Bonnyman and Titler at the Pittsburgh meeting were discussing the contract and its restraints. He says their discussion about this "was inconclusive and our next move was that he suggested that we go see Mr. Boyle" (299a). They did see Boyle but all Bonnyman got was a 15 minute lecture demanding a contract (297a). It is obvious not one word of the national contract could be changed. It never had been in a single instance since 1950.

3. *By Expressing a Willingness to Consider Signing a Contract at Scotia Subject to Certain Adjustments, Bonnyman Was Only Expressing the Kind of Attitude Required by the Labor Law; That is, a Willingness to Bargain.*

It was at the same Pittsburgh meeting with Titler that Bonnyman said the company would entertain the idea of signing at Scotia if Leatherwood would be left alone, subject however to working out certain conditions (299a).

The Bonnyman deposition gives no insight as to what the conditions to be worked out were. However, the Stallard testimony about the Scotia negotiations clearly discloses that the real stumbling block was the welfare fund provisions of the contract. Paying \$300 per month per man for benefits which could be purchased from insurance companies for \$60 per month, with the extra

money going off to other places for others to use was not acceptable to Scotia, which wanted to set up a welfare fund for the Scotia unit (231a-232a, Exh. 36, 235a, 255a). Of course, this would also have eliminated the "Eighty Cent Welfare Clause" and its effect on affiliates.

Bonnyman's offer to consider a contract at Scotia subject to adjustment must be viewed in the light of what the labor law requires. There would be a violation of the labor law duty to bargain if he expressed any attitude other than a willingness to bargain at Scotia.

We submit, that Judge Lively has given UMW's contention about Bonnyman's visits causing the damages actually more than the credit it is due when he wrote in his Memorandum on post-trial motions:

"Though the jury could have viewed the Bonnyman testimony as establishing a totally unrelated cause of Scotia's damages, I do not believe that this testimony, consisting of several pages of questions and answers in a deposition taken in a previous case, completely eliminated every reasonable inference that Scotia suffered damages as the result of an illegal agreement between UMW and BCOA. Though UMW emphasizes 'the Leatherwood issue' in its brief, the testimony of Bonnyman was not presented at the trial as the one fundamental difference between this case and the *Tennessee Consolidated* and *South-East Coal* cases. Actually, in its brief UMW uses such expressions as 'fairly to be inferred' and 'in so many words.' While the Bonnyman testimony could be viewed as supporting the interpretation placed upon it by UMW, it does not compel such a conclusion." (36a-37a).

We submit all Bonnyman was trying to do was go the extra mile in carrying out a statutory duty to bargain in good faith, and attain some contract his companies could live with, and avoid the disaster of a strike. The jury so found.

4. *Antitrust Law Does Not Require That a Sherman Act Violation, to Impose Liability, Be "Ruinous" to the Plaintiff. It Rather Requires Injury or Damage to Business or Property.*

UMW's brief appears to say that the Supreme Court in *Ramsey* (401 U.S. at 314) requires a showing of absolute inability to pay UMW's national contract terms in order to recover and it makes no difference in what kind of shape or condition those terms leave the business after such payment is extracted from it.

This was not UMW's view of the law when it proposed the instructions to the jury which Judge Lively did give. Those instructions proposed by UMW (440a-443a) used the expression "where the union agrees to ____ insist on imposing or maintaining in other bargaining units specified wage standards *harmful, or ruinous* to the business of those employers it is liable ____" (447a).

This, of course, is consistent with the Clayton Act, Section 4 which imposes liability to "any person who shall be injured in his business or property" and the recovery shall be "three-fold the damages by him sustained". (15USC 15).

Under this "ruinous" contention UMW relies on what Bonnyman said to Titler as showing an admission of ability to pay. But Bonnyman made no such admission.

Judge Lively's Memorandum gives UMW's contention in this regard all that it is entitled to when he says:

"In its brief UMW also argues that the uncontroverted testimony of the president of Scotia's parent, Blue Diamond, shows that the plaintiff was fully able to meet the demands of UMW at the Scotia mine and offered to do so in exchange for an agreement by UMW not to attempt to organize the Leatherwood Mine which was also owned by Blue Diamond. UMW quotes from *Ramsey I*, 401 U.S. at 313. 'Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct.' UMW argues that the testimony of Mr. Bonnyman shows that the UMW demand was not ruinous to Scotia and that it brought the strike and consequent damages upon itself by asking UMW to violate its principles by agreeing to make no attempt to organize the Leatherwood Mine.

"The phrase, 'ruinous to the business' does not appear to me to establish an absolute requirement for recovery in this type case. If a conspiracy in violation of the antitrust laws is shown, the victim of the conspiracy should be able to recover its damages whether they result in absolute ruin or not. Moreover, while the testimony of Mr. Bonnyman contains reference to the fact that Scotia was a profitable operation at the time of the discussion with UMW in 1965 he also stated that it would have been disastrous for Scotia to have met the terms of the national contract." (35a-36a).

5. *On the Record, Scotia Would have Been Ruined by the National Contract Even if Considered Alone.*

The Bonnyman deposition, taken in an entirely different legal matter, is not the only evidence as to plaintiff's ability to observe national contract terms. The background of the effects of the national contract on the industry generally, the Hazard Field, and Blue Diamond is given above.

Hoffman, who succeeded Bonnyman as President of the companies, and who was Vice President and a director during the negotiations, testified:

"Perhaps at that time we could (have) done fairly well without the 40¢ per ton welfare. That was the stumbling block as for trying to make any profits." (56a).

And more specifically he testified:

"Q115. Did the board make an analysis of what the effect the signing of the national contract would be on the profit situation in Scotia? A. Well it would have brought down the profits the Scotia Mine was carrying our load at that time—of making any profits and if we'd—as I stated, we might have been all right without the 40¢ per ton welfare is what we found that we couldn't come out and make a profit." (57a).

This answer went to the jury without UMW going to the records to challenge it. Nor could there be any successful challenge to this answer on the record.

During the month of March, 1966, when the first meetings between Scotia and UMW were being held, the Scotia officials looked back on the previous fiscal year's profits of \$574,811 for March 31, 1965 (245a). While in the three months before the strike productivity and profits were to reach higher levels (458a), there was reason during the negotiations for the officials of Scotia to fear added costs of around \$600,000 as putting the Scotia Mine not just in a marginal position but in a net loss (see 245a and 458a). As Scotia's Secretary, Stallard, testified:

"You don't know what would take place. Once you sign a contract you are stuck with the terms and provisions of that contract. You pay the wages, pay the Welfare. If you lose \$1,000,000 you still are going to pay the wages and you pay the Welfare. The company is the one that loses." (256a).

UMW was demanding a wage increase to reach a scale of \$27 to \$30 per ton per day, an increase of about \$6 per man per day (233a). The 1966 national contracts signed by BCOA and UMW during the Scotia meetings was actually \$27.25 to \$30 per day, a little over an average of \$6 per day increase or about 4.1 times the \$1.50 increase which Scotia gave in 1966 and which cost \$73,130 (462a). If the increase were 4.1 times that, it would project an increased cost of \$300,000, or more than half the profits of the previous fiscal year.

The extra 30¢ to 40¢ per ton welfare cost on Scotia's 1,000,000 ton per year mine (43a, 458a) which UMW was demanding would mean additional extra cost of \$300,000 to \$400,000, or a total (combined with increased wages) of between \$600,000 to \$700,000 increased cost, or considerably more than the previous fiscal year's profit.

And this is without consideration of the threat of the "Eighty Cent Welfare" penalty hanging over the Blue Diamond affiliated companies.

Mr. Hoffman was asked on cross-examination:

"Well, Mr. Hoffman, isn't the whole theory of collective bargaining trying to get the union and the company together on how much profit the company is going to make and how much the union is going to get?"

Mr. Hoffman's reply is worthy of note:

"I would think you should have a right to bargain so that you have knowledge that you are going to make money, some money, without accepting someone else's contract that you didn't have anything to do with." (65a).

When this right was stripped away, as in this case, by reason of illegal conspiracy, certainly there is liability for "injury" or "damage" within the meaning of 15 USCA Sec. 15, and within the meaning of the Supreme Court's *Ramsey* Opinion.

CONCLUSION

The petition of UMW does not reflect the record except for those parts which UMW wants to show. It seeks to draw conclusions just from those parts. It omits any reference whatsoever to the well documented facts about the conspirators' express anti-competitive plans and purposes and their actually putting into effect together the apparatus of the conspiracy, and their expressly agreeing that restrictions should continue as they fought together the Landrum-Griffen case through the period of this case.

The jury had the benefit of the whole record and rejected UMW arguments based on only a small part of the record. The District Court and Court of Appeals have found the record supports the verdict. There is no legal issue in the light of the fact that the Court followed the charge to the jury requested by UMW.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-111

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL CO.,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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I. Reply to Respondent's Counterstatement of Facts and Argument as to Sufficiency of the Evidence.

The first question presented in UMW's Petition for Writ of Certiorari is whether there is sufficient evidence to sustain the jury's finding that UMW conspired with major coal producers to impose a ruinous wage standard on Scotia in violation of the Sherman Act. UMW contends that the evidence, considered either as a whole or piece by piece, at *most* gives rise to equally plausible inferences of illegal conspiracy on the one hand, and lawful coincidence of motives on the other. Consequently, under

the "equal inference" rule of law, Scotia failed to meet its burden of proof, the jury had no room to speculate, and the District Judge, *as a matter of law*, was obligated to direct a verdict for UMW.

In its Petition, UMW analyzed the cases in point in some detail, pointing out that the four "areas" of evidence cited by the District Judge as sufficient to support the jury verdict, have been held by other Courts to be at most equal inference evidence, incapable of supporting an inference of UMW-Employer conspiracy, as a matter of law.

Scotia's response is an express refusal to meet the issue at all, terming it a "waste of time" (Respondent's Brief, 36). Scotia maintains that UMW presented the facts "in a way to make its contentions plausible" (R.B., 36), "bending the facts" to fit its contentions (R. B., 36), and "completely ignoring the bulk of the record on conspiracy" (R. B., 35).

Scotia's ARGUMENT consists of one-half page in support of the District Judge's charge to the jury (never in issue), three pages of quotations from the District Judge's opinion, and one and one-half pages explaining that the sufficiency of the evidence question raised by UMW is a "waste of time" and unworthy of examination.

Without one word of analysis of the equal inference rule, Scotia relies instead on a twenty-five page COUNTERSTATEMENT OF FACTS (R.B., 5-31), discussing evidence in the record which Scotia represents to be "new evidence introduced for the first time from Minutes of meetings and public statements" proving the conspiracy beyond question and rendering UMW's argument about coincidence of motives and equal hypothesis "meaningless" (R. B., 35).

UMW agrees that this Court cannot determine whether the evidence is sufficient to support the jury's verdict without first

determining what the evidence is. UMW categorically denies Scotia's allegations that it distorted facts in its Petition. It is significant that Scotia cites not one single specific inaccuracy or misrepresentation. UMW also emphatically denies that it ignored the bulk of the evidence as alleged by Scotia. In its Petition, UMW focused appropriately on the four "areas" of evidence cited by the District Judge as sufficient to support the jury's verdict, illustrating with arguments and legal authority that each "area" is no more than equal inference evidence.

UMW contends that an examination of Scotia's COUNTERSTATEMENT OF FACTS will reveal that the omissions, overstatements and outright misrepresentations of fact are found there, and not in UMW's Petition.

To begin with, Scotia has claimed that this record contains new evidence never before considered in any of the related conspiracy cases, which proves the conspiracy beyond question. This alleged new evidence is in the form of "certain newly discovered Minutes of meetings, correspondence and testimony of actual participants" (R. B., 32).

The same evidence was offered by the plaintiff in the second Ramsey case (*Ramsey v. UMW*, 344 F. Supp. 1029, at 1038) in a motion to reopen the proof. In refusing to admit this evidence, District Judge Wilson reasoned as follows:

"The Court has read and considered all of this evidence. Although voluminous, it is in very substantial measure cumulative to the proof offered upon the trial. The newly offered evidence offers no new theories of liability and presents no significant alteration of the evidence as presented upon the trial."

Obviously, this new evidence did not sway Judge Wilson from his decision that:

"The Court can only conclude that the evidence weighs no less equally in favor of a unilateral action on the part of the Union than it does in favor of conspiratorial action on the part of the Union." (1038)

This is the proper view, UMW submits, of what Scotia chooses to call new and overwhelming evidence of conspiracy. It should be remembered that the District Court advanced four specific areas of evidence which it felt might support the jury verdict, and UMW discussed each specifically in its Petition, illustrating with clear legal authority why each must, as a matter of law, be considered no more than equal inference evidence. Scotia absolutely fails to refute or even consider this issue, and instead relies on sweeping and nebulous references to "abundance of evidence" (R. B., 36). By an accumulation of statements taken out of context, many of which were made years before the alleged conspiracy by persons no longer living or connected with the coal industry by the time of the strike in question, and by drawing inference upon inference, Scotia seeks to obscure the fact that there is not one single item of evidence from which the jury could distinguish a conspiratorial motive from a lawful coincidence of motive.

Furthermore, Scotia's COUNTERSTATEMENT OF FACTS is simply not accurate. For example, Scotia states that Mr. George Love, former head of Consolidation Coal Company, "testified he had a desire to do what he could to see that no competition paid lower labor costs than Consolidation paid regardless of the competitor's circumstance or mode of production" (R. B., 8). A reading of what Mr. Love actually did say, taken from the reference cited by Scotia (92a-93a), reveals a glaring misrepresentation:

Q. Mr. Love, in this period of time were you also concerned that of the companies, competitors in the industry not have a lower wage scale than Consolidation Coal Company? A. That is right.

Q. Did you have a desire if you could avoid it to see that other companies did not pay a lower wage scale than you at Consolidation? A. I didn't think that was up to me. I certainly didn't want to see other companies pay lower wage scales but there was nothing I could do about it, if they did.

Q. Did you have a desire that this not be done if you could avoid it? A. There was no way to avoid it. I have answered that already. Of course, nobody, including you, you wouldn't want some lawyer next door offering your services cheaper than you were offering yours, would you? That is true of our competitors. We didn't want them to pay less wages than we were paying.

Q. I refer to page No. 405, 408 and 409—page 25 of 405 question: did you have a desire and a purpose to get around the possibility of any competitor in the coal industry paying a lesser wage than you paid? A. I don't know what you mean by 'purpose' but I will say that I had a desire. I had the desire that wages of people that I was competing with would be somewhere in the neighborhood of the wage that I was paying. That's a normal situation in any industry, the automobile industry, the steel industry or any other industry. You don't want to be in a position if you could avoid it where your neighbor has a direct advantage over you.

Q. Would this be true regardless of mode of production of your neighbor or the ability of the neighbor to pay the same wages that you could pay? A. That isn't—let me answer it. I think I answered it before but you don't want your neighbor if you can avoid it to have any advantage over you. You want to be able to compete freely and easy with him and, by golly, you don't want him to have a lower wage scale than you if you could avoid it. I would accept all of this testimony so far as you like. It is in the record. I testified to it and I still believe it.

Far from supporting Scotia's statement that Mr. Love wanted to do what he could to see that no competition paid lower labor costs than Consolidation, his testimony indicates that a lower wage scale by competitors of Consolidation did not make him happy, but that he certainly did nothing and could do nothing to avoid it.

This is not an isolated instance. On page 6 of its Brief, Scotia states that "in 1948 and 1949 the growing threat that the industry would become concentrated into a small number of major producers caused violent reaction from UMW," citing pages 78a through 82a. When those pages of the Appendix are reviewed, it is apparent that once again Scotia has, at the very least, made a sweeping overstatement.

Scotia would have the Court believe its contention that "UMW's policies dramatically shifted and changed in 1950. Before 1950 UMW's prime basic policy was the promotion of equality in work opportunity among all of its members with the accompanying and necessary corollary of competitive equality among the coal producers of the industry." (R. B., 6). According to Scotia, beginning in 1950, UMW actively conspired with large coal producers to promote mechanization to obtain a higher wage scale.

Scotia contends that "it became the policy of UMW to have the production of coal taken over by big combines and bring about concentration in the industry and this was largely achieved (65a, 188a-189a, 190a-191a)" (R. B., 10).

The portions of the record cited by Scotia, particularly statements of John L. Lewis, actually reveal that mechanization was an inevitable result of economic forces not within the control of UMW, and that the statements by Lewis simply evidenced recognition of the trend toward mechanization, and certainly did not evidence any "radical" change of policy to "bring about concentration in the industry":

By Mr. Rowntree: Yes. A reprint. A reprint from the U. S. News and World Report in the United Mine Workers Journal. And it includes a statement by Mr. Lewis on this subject. Quoting: "It has been a matter of common sense and leadership, the coal industry developed a more stable and responsible leadership than was possible in the earlier years. There formerly was a multiplicity of producing units in the industry, leading to destructive competition in the most violent form. Most producers then were small. Each produced only a small portion of the total coal output. That situation held progress back. There was no responsible leadership that could speak for the whole industry or for any substantial area of the industry. There has been great progress in modernization of the industry in recent years. It has resulted in concentration of a greater proportion of the production in larger corporate units. The coal operators developed a new leadership with a constructive outlook and a greater sense responsibility. They came to the realization that common sense procedures were better than the old methods and with the concentration of production in fewer hands, they had more influence in the industry."

By Mr. Combs: Continue the reading: "Was there a change in attitude also on the part of the union? No. There was no change on our side. We always have favored mechanization of the coal industry in contradistinction to Great Britain, where the union has opposed it. . . ."

Scotia quotes other evidence out of context in an attempt to substantiate its theory of a radical shift in UMW policy in 1950 explained only by an illegal conspiracy with the large operators. For instance, it emphasizes a statement of Mr. Harry Moses of BCOA, in which he described his relationship to the industry and to the union as being part of a "quest for stability", implying a secret and unlawful combination. This ignores the

clear evidence that this and similar "stability" statements relied on by Scotia had reference to the stability of the work force and the elimination of the long strikes and turmoil in general that had characterized the coal industry of the 1940's. George Love so testified (363a) and added that coal operators signed the 1950 Agreement not as a matter of conspiracy, but to avoid worse alternatives, such as further loss of markets, or government take-over (359a, 360a).

Despite Scotia's claim to the contrary, it has been recognized by the District Court in *Ramsey* (344 F. Supp. 1029, 1037) that "it appears clear from the evidence that national uniformity in wage rate in labor standards in the coal industry has been a consistent policy and goal of the UMW since its inception in 1890."

Perhaps the most striking example of the type of unsupported inference advanced by Scotia concerns its comments on the 80-cent clause at page 25 of its Brief. UMW has consistently maintained that nothing in the PWC can be taken to evidence a conspiracy, but also argues that in the event the PWC could be read to support a finding of conspiracy, that finding would not apply here because the PWC was removed from the contract in 1964 and, indeed, the 80-cent clause in the 1964 Contract superseded the PWC.

Without a single word of testimony to support its position, and without reference to the record, Scotia boldly proclaims that UMW and large coal operators "used" the beginning language of the 1964 agreement "to make it possible for them to claim later, if they should get in trouble, that they had taken PWC out of the Contract . . ." (R.B., 25). UMW submits this is typical of the kind of overstatement and misstatement that is repetitiously found in this case. What happened was very simple. As in earlier amendments to the 1950 agreement, certain provisions of the basic agreement and the amendments were car-

ried forward. Other provisions were not carried forward and therefore ceased to exist. The 1964 amendment¹ did not carry forward the PWC and it ceased to be a part of the contract. Yet the plaintiff was permitted to invite jury speculation that PWC continued in effect and plaintiff continues to argue the same thing to this Court!

Scotia thus attempts to avoid discussion of the issue of law involving sufficiency of the evidence with a staggering accumulation of such speculative inferences. Scotia avoids the legal argument because it has no answer to the authority presented in the Petition by UMW.

Scotia's comment on the law, to the extent that it comments at all, is simply a listing, without analysis, of related cases in which jury verdicts of conspiracy were returned. It attempts no response to UMW's detailed analysis of those cases, which analysis leads to the inescapable conclusions that this Court has never specifically passed on the question of the sufficiency of circumstantial evidence to support an inference of conspiracy (Petition, 18), that the equal inference rule was not at issue in either *Tennessee Consolidated Coal Company v. UMWA*, 416 F.2d 1192 (6th Cir., 1969), cert. denied 397 U.S. 964, or *UMW v. South-East Coal Company*, 434 F.2d 767 (6th Cir., 1970), cert. denied 402 U.S. 983, two 6th Circuit cases cited by Scotia in support of its verdict, and that the Second *Pennington* (257 F. Supp. 815) and the Second *Ramsey* (334 F.Supp. 1029) cases were decided on the equal inference rule as a matter of law, and are tantamount to a directed verdict in a jury case (Petition 20-21).

It is especially appropriate that this Court consider at this time the extent to which a jury may infer an anti-trust conspiracy

¹ The National Bituminous Coal Wage Agreement of 1950 and the 1951, 1952, 1955, 1956, 1958, and 1964 Amendments are to be found as Exhibits 14, 24, and 28, but they have not been printed in the Joint Appendix.

from indirect, circumstantial evidence. Recently, more and more legal scholars, as well as litigants, have raised questions about the ability of a jury to assess complex factual situations in anti-trust cases.

Because the application of the equal inference rule to the evidence generated in this case is a serious matter and not the "waste of time" Scotia terms it, the writ should be allowed.

II. Reply to Respondent's Argument as to Scotia's Ability to Pay

UMW has shown that in negotiations between Blue Diamond President Bonnyman and UMW Vice President Titler, Bonnyman stated that Scotia was able to meet the UMW agreement and would do so if UMW would agree not to attempt to organize Blue Diamond's Leatherwood mine, which was then operating under the Southern Labor Union.

We reply to Scotia's various responses:

1. Scotia points out that the Bonnyman testimony came from a deposition in another case "which did not pertain to the Scotia Mine (R.B., 37)."² Elsewhere, Scotia argues the deposition had to do "with an entirely different case and a different time" . . . (R.B., 41). The testimony did indeed come from another case—*Blue Diamond Coal Company v. UMW*, Civil No. 6189, U. S. District Court, Eastern District of Tennessee. The case was, however, an antitrust suit based on the same theory as the instant case, except that it involved the Leatherwood mine rather than the Scotia mine. As Bonnyman's lengthy deposition shows (280a-305a), the questions asked dealt with

² That Bonnyman's testimony came from a deposition in another case hardly made it novel. Much of the testimony in the instant case had been given in prior cases and was read herein pursuant to stipulations of counsel.

the conspiracy issues. There was nothing in that case or in the Bonnyman deposition that in any sense dilutes the relevance of the testimony on the Bonnyman-Titler discussions. The testimony is clearly and directly in point. The deposition, among other things, dealt with the Scotia-UMW negotiations involved in this case.

2. Throughout its argument of Question No. 2 Scotia contends that since Scotia mine was the source of Blue Diamond's profits—upon which the Leatherwood mines, the Scotia mines, and the Blue Diamond stockholders were dependent (R.B., 39)—it was entirely legitimate to tie the Scotia negotiations to the Leatherwood operation. And this is precisely what Bonnyman did. UMW was given the choice of its standard contract with the tie or a low-wage contract without it. Certainly the condition was not legitimate bargaining in a labor-law sense, for it did not relate to the conditions of employment of the Scotia employees—the only employees of the Blue Diamond complex UMW was certified by the NLRB to represent. The Scotia contention (R.B., 41) that Bonnyman was simply demonstrating a willingness to bargain as "required by labor law," is simply without merit. Scotia had no more right to tie its bargaining position to Leatherwood than UMW would have had had it insisted upon recognition at Leatherwood as a condition to reaching agreement at Scotia. *NLRB v. Electrical Workers* (5th Cir., 1959), 266 F2d 349, *NLRB v. George P. Pilling & Son Co.* (3rd Cir., 1944), 119 F2d 32. The illegality of the condition is, moreover, heightened by antitrust considerations. Indeed, there is a special irony in Scotia's position, for Scotia's basic contention is that UMW agreed with one bargaining unit on what it would insist upon in negotiations with other bargaining units. Yet, here Scotia was attempting to use its leverage to keep secure a competitively favorable wage standard at a different bargaining unit. Scotia's position calls forcibly to mind the following language from *Pennington* (381 U. S. 668):

One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another.

Scotia was doing precisely what it said BCOA was doing, except the other way around. UMW contends the alternatives posed by the Scotia offer precludes a finding of conspiracy in the instant case.

3. Scotia argues (R.B., 40-41), that Bonnyman was not willing to sign a contract with UMW because he was concerned with having to pay some \$2,000,000 on coal mined at Leatherwood by reason of the so-called 80-Cent Clause (186a-187a). The argument is without merit. In the first place the 80-Cent Clause, had Scotia signed the UMW contract, would have had no application to coal mined at Leatherwood and sold to others. Blue Diamond's Leatherwood operation, under contract with the Southern Labor Union, would have been in no different posture than it was before. In the second place, in no way may Bonnyman's testimony be given this interpretation. This is not what he told Titler. Bonnyman told Titler if the United Mine Workers would "leave us alone in the Leatherwood field and *if we could work out some of the local problems at Scotia, that we would sign the contract . . .*" (299a-300a). To elevate a request for resolution of unstated "local problems" into concern over a strained application of the 80-Cent Clause involving \$2,000,000 a year is a bootstrap argument of the first order. The critical condition in the Bonnyman approach was not "local problems" but rather the demand that UMW "leave us alone" at Leatherwood. The meaning of the testimony is unmistakable.

4. Scotia argues (R.B., 43-44) the anti-trust laws do not require a violation to be "ruinous" as a basis for liability. The argument misses the point. In *Ramsey*, the Supreme Court said a union would be liable if, by agreement, it insisted upon wage standards "ruinous to the business" of the employer, 401 U.S. at 314. Here, UMW was dealing with a successful, highly mechanized, well-financed company, and, significantly, one which told it, in plain words, that it could meet the UMW contract. Our argument is that a conspiracy may not be found in these circumstances and that a union is not required to offer a different or lower scale where, as here, the employer has said, "I can pay, but I don't want to." The added costs UMW's contract would have imposed were well within the profit Scotia claimed for the twelve months prior to the strike. The fact the return on Blue Diamond's investment in the Scotia mine (not disclosed in the record) would have been less than before is the normal consequence of any successful union negotiation. The argument demonstrates that this case goes far beyond the situations contemplated in *Pennington* and *Ramsey*.

Respectfully submitted,

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